Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

LINDA L. VAUGHEY, Commissioner of Political Practices,

Petitioner,

v.

MONTANA CHAMBER OF COMMERCE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MIKE MCGRATH
Attorney General
JAMES M. SCHEIER *
Assistant Attorney General
State of Montana
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
* *Counsel of Record for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Is Montana's Initiative 125, which prohibits corporations from using corporate treasury funds in ballot issue campaigns but permits unlimited corporate spending on ballot issues through segregated funds contributed by shareholders, employees, or members of the corporation, permissible under the First Amendment as a means of addressing the distorting effect of significant corporate expenditures on ballot issues?

PARTIES

The Petitioner is Linda L. Vaughey, the Montana Commissioner of Political Practices. Petitioner has been substituted by operation of law as a party to this action in place of her predecessor, Ed Argenbright, whose term expired on December 31, 1998. Sup. Ct. R. 35.3.

The Respondents are the Montana Chamber of Commerce, Sletten Construction, Lehrkind's, Inc., Kalispell Area Chamber of Commerce, Montana Hospital Association, Montana Farm Bureau, Montana Education Association, Montana Mining Association, Communities for a Great Northwest, Golden Sunlight Mine, Inc., Yellow Band Gold, Inc., Continental Lime, Inc., and Northwest Mining Association, all corporations or incorporated associations.

Mike Cooney, the former Montana Secretary of State, was a defendant in the proceedings below. Mr. Cooney has been succeeded in office by Bob Brown.

The "I-125 Proponents Committee," consisting of the League of Women Voters of Montana, Montana Common Cause, the MontPIRG 2030 Fund, and Citizens for I-125 (hereinafter "Intervenor"), intervened as a defendant in the proceedings below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that this Court issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on September 26, 2000.

OPINIONS BELOW

A three-judge panel of the United States Court of Appeals for the Ninth Circuit filed its Opinion on September 26, 2000. The Opinion is reported at 226 F.3d 1049 (9th Cir. 2000). (App. 1.) The Ninth Circuit Court of Appeals denied a Petition for Rehearing With Suggestion for Rehearing En Banc on February 20, 2001. (App. 84). The district court issued its written decision and judgments on November 20, 1998. It is reported at 28 F. Supp. 2d 593 (D. Mont. 1998). (App. 33.) The district court's opinion and order on summary judgment, issued on February 18, 1998, is unreported. (App. 54.)

JURISDICTION

The Respondents filed claims asserting jurisdiction under Article III of the United States Constitution and 28 U.S.C. § 1331. The district court issued its decision and judgments on November 20, 1998. Petitioner filed a Notice of Appeal on December 21, 1998. Appellate jurisdiction existed under 28 U.S.C. § 1291.

On September 26, 2000, the Ninth Circuit Court of Appeals issued its Opinion affirming the decision of the

district court. Petitioner and Intervenor filed a timely Petition for Rehearing With Suggestion for Rehearing En Banc on October 10, 2000. The Ninth Circuit Court of Appeals denied the Petition for Rehearing on February 20, 2001. Jurisdiction over the petition for certiorari exists under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Initiative 125 amended Mont. Code Ann. § 13-35-227 as follows (language added by Initiative 125 is in italics):

Prohibited contributions from corporations. (1) (a) *Except as provided in subsection (4),* a corporation may not make a contribution or an expenditure in connection with a candidate, *a ballot issue,* or a political committee that supports or opposes a candidate, *a ballot issue,* or a political party.

(b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations.

(2) A person, candidate, or political committee may not accept or receive a corporate contribution described in subsection (1).

(3) This section does not prohibit the establishment or administration of a separate, segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation.

(4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas and that:

(a) does not engage in business activities;

(b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;

(c) does not accept foreign or domestic for-profit corporations as members; and

(d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for-profit corporations.

(5) A person who violates this section is subject to the civil penalty provisions of 13-37-128.

STATEMENT OF THE CASE

In November 1996 Montana voters approved Initiative 125 (I-125), which prohibited direct corporate spending in connection with ballot issues. I-125 permitted corporations to establish and administer separate, segregated funds using contributions from shareholders, employees, or members of the corporation, from which corporate contributions and expenditures to ballot issues could be made. In addition, I-125 provided that the restrictions do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas, and that:

> (a) does not engage in business activities;
>
> (b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;
>
> (c) does not accept foreign or domestic for-profit corporations as members; and
>
> (d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for-profit corporations.

Mont. Code Ann. § 13-35-227(4) (as amended by I-125).

In February 1997, the Montana Chamber of Commerce and several other Montana incorporated entities filed a complaint in federal district court, seeking a declaration that I-125 was unconstitutional and a permanent injunction against its enforcement. *Montana Chamber of*

Commerce v. Argenbright, No. CV-97-6-H-CCL (D. Mont.) (*Chamber* case). The complaint was filed against Montana's then Commissioner of Political Practices, Ed Argenbright, who was charged by law with enforcing the provisions of I-125.

In February 1998, the district court held on summary judgment that I-125 was not void for vagueness, and did not violate either the Due Process or the Equal Protection clause.[1] The court concluded that a trial was necessary to determine whether the initiative violated the First Amendment. (App. 54.)

In 1998 Initiative 137 (I-137) qualified for the Montana general election ballot. I-137 sought to impose a ban on new cyanide heap and vat leach open-pit gold and silver mines in Montana. On September 1, 1998, the Montana Mining Association (MMA) and several other mining associations and corporations filed a separate lawsuit in the same court alleging that by denying them the opportunity to expend corporate treasury funds in opposition to the mining initiative, I-125 was unconstitutional as applied to them. *Montana Mining Association v. Argenbright*, No. CV-98-37-H-CCL (D. Mont.) (*MMA* case). The I-125 Proponents Committee was permitted to intervene as a defendant in both cases. The district court denied a request for preliminary injunction to prevent the election on I-137, and ordered the *MMA* case consolidated to a limited extent with the *Chamber* case. Both

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[1] None of the respondents appealed the district court's decision denying them relief on their Equal Protection and Due Process claims. Accordingly, those claims were not before the Ninth Circuit in this case.

cases were scheduled for trial in October 1998. The *MMA* case was tried immediately following trial on the *Chamber* case, and all evidence admitted in the *Chamber* case was also deemed admitted in the *MMA* case.

At the conclusion of the trials, the district court ruled from the bench declaring that I-125 is unconstitutional, and permanently enjoined the State of Montana from enforcing the statute. The district court issued its written decision and judgments on November 20, 1998. (App. 33.) In the *MMA* case, however, after declaring I-125 invalid, the district court refused to invalidate the election on I-137, which had been passed by the Montana voters in the general election earlier in November. (App. 33.)

The Petitioner and Intervenor appealed the rulings in both cases as to the validity of I-125 to the Ninth Circuit Court of Appeals. Several mining association plaintiffs in the *MMA* case filed cross-appeals on a separate issue involving the district court's refusal to enjoin, and then to invalidate, the election on I-137. In a decision issued on September 26, 2000, a divided three-judge panel of the Ninth Circuit Court of Appeals affirmed the district court's ruling that I-125 violates the First Amendment.[2]

The majority opinion, authored by Judge Pamela Ann Rymer, acknowledged the tension between this Court's opinions in *First National Bank of Boston v. Bellotti*, 435

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[2] The Ninth Circuit panel also unanimously affirmed the district court's refusal to enjoin the election on I-137, as well as the district court's refusal to invalidate the vote on the initiative following its approval by the electorate. The Petitioner does not contest the Ninth Circuit's rulings regarding I-137.

U.S. 765 (1978), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), but concluded that *Bellotti* provided binding authority for the unconstitutionality of I-125 from which the Court of Appeals could not deviate. 226 F.3d at 1057-58 (App. 19-20.)

In a separate concurring opinion, Judge M. Margaret McKeown noted that "[l]egitimate policy concerns have prompted legislators to address the power of the corporate contributor." 226 F.3d at 1059 (App. 23). While she also expressed her belief that it should be possible to craft a statute "to meet a compelling interest in preserving the integrity of the electoral process, such as where contributions so distort the political process that they undermine our democratic system," she was not convinced that Montana had articulated a compelling interest justifying the restrictions embodied in I-125. 226 F.3d at 1059 (App. 23) (McKeown, J., concurring).

Judge Michael Daly Hawkins dissented, noting that this case falls "squarely between two conflicting Supreme Court opinions" (referring to *Bellotti* and *Austin*), 226 F.3d at 1059 (App. 23). He agreed with legal scholars who have observed that this Court's decision in *Austin* "undermines the distinction between candidate elections and referenda," 226 F.3d at 1059 (App. 27-28), and concluded that I-125 is "justified by Montana's asserted interest in eliminating what its people have determined to be distorting effects of corporate wealth on the electoral process." *Id.* at 1062 (App. 32) (Hawkins, J., dissenting).

REASONS THE COURT SHOULD GRANT THE PETITION

1. The Ninth Circuit's majority opinion cannot be reconciled with this Court's most recent decisions addressing corporate political spending. The Ninth Circuit failed to recognize that I-125 was carefully and precisely tailored to comply with this Court's rulings in *Austin* and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), and that Montana has a compelling interest in preventing corporations from using the special advantages conferred upon them by the state to gain an unfair advantage in the political process. As the dissenting judge in the court below observed, the relationship between *Bellotti*, the authority found controlling by the majority of the Ninth Circuit panel that decided this case, and the later decisions in *Austin* and *MCFL* has never been addressed by this Court in the context of a statute like I-125, which prohibits corporate treasury contributions to ballot issue campaigns, but allows contributions from a separate fund of the kind approved by the Court in *Austin*. This important unresolved issue warrants review by the Court in this case.

2. This case is particularly timely in light of the ongoing national debate about the role of corporate money in political campaigns. This Court has never directly addressed the constitutionality of a provision like I-125, and because the statute has been stricken down on constitutional grounds Montana is not able to enforce its provisions. The issue is extremely important not only to Montana, but also to other states that have experienced massive corporate spending in ballot issue campaigns.

The constitutionality of this initiative is a matter of substantial national importance that warrants this Court's review.

I. THE NINTH CIRCUIT ERRED IN CONCLUDING THAT THE QUESTION OF THE CONSTITUTIONALITY OF I-125 IS CONTROLLED BY THIS COURT'S DECISION IN *FIRST NATIONAL BANK OF BOSTON v. BELLOTTI* RATHER THAN BY *AUSTIN v. MICHIGAN CHAMBER OF COMMERCE.*

The Ninth Circuit panel majority concluded that the constitutionality of I-125 is governed by this Court's decision in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978). The panel majority misconstrued *Bellotti* and failed to properly take into account the effect of this Court's more recent ruling in *Austin*. Moreover, the panel majority's attempt to distinguish *Austin* reflects its misreading of that case as well.

In *Bellotti,* this Court considered a Massachusetts law that prohibited any corporate expenditures on ballot measures that did not involve the property, assets, or operations of the corporation. The statute also provided that no ballot issue affecting taxation of the income, property, or transactions of individuals would be deemed to materially affect the corporation. 435 U.S. at 768. The Massachusetts law thus required the state and corporations to make content-based distinctions in determining whether certain corporate expenditures were permissible, an aspect of the statute that this Court found to be particularly troublesome. *See Bellotti,* 435 at 785 n.22.

Unlike I-125, the statute examined in *Bellotti* did not include a provision permitting corporations to establish and administer separate, segregated funds for spending on ballot issue campaigns. Some years later, when this Court considered the constitutionality of a provision of the Federal Election Campaign Act as applied to a corporation formed for political purposes, it noted that the law, which permitted corporate political spending through segregated funds, "is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in [*Bellotti*]." *MCFL*, 479 U.S. at 259 n.12. *See also Austin*, 494 U.S. at 660 (where this Court noted that Michigan's statute "does not impose an absolute ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds").

While this Court struck down the Massachusetts statute in *Bellotti*, the constitutional issue presented by this case, contrary to the Ninth Circuit panel majority's conclusion, cannot be resolved solely by reference to *Bellotti*, given the material distinctions discussed above between the Massachusetts corporate expenditure ban and I-125. The *Bellotti* decision should not be viewed in isolation. Rather, that decision must be considered and analyzed within the context of the specific provisions of I-125 and this Court's later rulings in *MCFL* and *Austin*.

In *Austin*, decided twelve years after *Bellotti*, this Court upheld the constitutionality of a Michigan law that prohibited corporations from making independent expenditures in candidate campaigns using corporate treasury funds, but permitted such expenditures to be made from

separate, segregated funds contributed by the officers, employees, or shareholders of the corporation. Finding it unnecessary to determine whether the law was justified by Michigan's compelling interest in preventing actual or apparent financial quid pro quo corruption, this Court noted that the statute

> aims at a ***different type of corruption in the political arena:*** the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.

Austin, 494 U.S. at 660 (emphasis added).

This "different" type of corruption had actually been alluded to by this Court several years prior to *Austin*. In *MCFL* the Court noted that corporate spending on political activity "raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *MCFL*, 479 at 257. While acknowledging the legitimacy of concerns regarding the use of corporate wealth for political purposes, the Court declared unconstitutional a provision of federal election law as applied to MCFL, because the organization was formed not to make a profit, but to espouse political ideas:

> Regulation of corporate political activity thus has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes. Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed to disseminate political ideas, not to

> amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace.

MCFL, 479 U.S. at 259. This Court found that requiring an ideological corporation like MCFL to make political expenditures through segregated funds is an unconstitutional restriction on First Amendment rights. *MCFL*, 479 U.S. at 263-65.

In contrast, in *Austin* the Court noted that requiring corporations such as the Michigan Chamber of Commerce to make their political expenditures from a separate, segregated fund "ensures that expenditures reflect actual public support for the political ideas espoused by corporations." *Austin*, 494 U.S. at 660. Moreover, that provision in the Michigan law resulted in a conclusion by this Court that the law was sufficiently narrowly tailored to survive constitutional scrutiny. *Id.*, 494 U.S. at 660-61.

Like the Michigan statute upheld in *Austin*, I-125 was also narrowly tailored to achieve the same objectives. I-125 contains a segregated fund provision similar to that upheld in *Austin*. That provision, which ensures that corporate expenditures on ballot issues are drawn from those who support the corporation's political objectives, also protects shareholders whose political beliefs may diverge from those of the corporation. The trial record in this case contains testimony by corporate shareholders who expressed their disagreement with the political positions taken by the corporations on specific Montana

initiatives. (Jewett testimony, RT 645-46; Intervenor's ER 55-56; Joseph McNulty Dep., Ex. 736 at 30-31.[3])

The Ninth Circuit panel majority concluded that *Bellotti*, since it has not been overruled, applies, and that *Austin*'s applicability is limited to cases involving corporate spending in *candidate* elections, and has no relevance to ballot issues. The panel majority's constrictive interpretation of the *Austin* decision is inconsistent with this Court's determination in that case that it was unnecessary to analyze the constitutional issue in terms of the traditional, quid pro quo financial corruption that can exist in candidate elections:

> *Regardless of whether this danger of "financial quid pro quo" corruption . . . may be sufficient to justify a restriction on independent expenditures,* Michigan's regulation aims at a *different type of corruption in the political arena*: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form. . . .

Austin, 494 U.S. at 559-60 (emphasis added). Further, the reference by this Court to a different type of corruption "in the political arena" suggests an application of this concept of corruption beyond candidate elections. Indeed, a number of legal scholars have concluded that this Court's rationale in *Austin* and *MCFL* authorizes states to require the use of segregated funds for corporate expenditures in ballot issue campaigns. *See, e.g.*, Adam

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[3] "RT" refers to the reporter's transcript in the *Chamber* case. "ER" refers to the Excerpts of Record filed in the Ninth Circuit appeal. "CR" refers to the district court clerk's record.

Winkler, *Beyond Bellotti*, 32 Loy. L.A. L. Rev. 133, 174 (1998); James B. Raskin, *Direct Democracy, Corporate Power and Judicial Review of Popularly-Enacted Campaign Finance Reform*, 1996 Ann. Surv. Am. L. 393, 408 (1996); Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 Cap. U. L. Rev. 381, 403 n.88 (1992), as well as additional authorities cited by the dissenting judge in the court below. 226 F.3d at 1061 (Hawkins, J., dissenting).

Regarding the *Bellotti* decision, Judge Hawkins suggested a more cogent approach to analyzing I-125 in light of the available Supreme Court precedent than that employed by the panel majority:

> In such a situation, we should not simply assert that one case directly applies and then ignore the other. We must do our best to reconcile the two. And in my opinion, the best way to reconcile these cases is to acknowledge that *Austin* identified a new rationale for limiting corporate campaign spending that does not turn on whether candidate elections or ballot initiatives are at issue. In addition, the statute in *Austin* was less objectionable than the statute in *Bellotti* because it allowed for corporate spending through a segregated fund. Because the initiative also allows for a segregated fund, I think it is justified by Montana's asserted interest in eliminating what its people have determined to be distorting effects of corporate wealth on the electoral process.

Montana Chamber of Commerce, 226 F.3d at 1062 (App. 32) (Hawkins, J., dissenting).

It is imperative that this Court reconcile its decisions in *Bellotti* and *Austin*. In *Bellotti*, which was decided twenty-three years ago, this Court addressed the issue in terms of financial quid pro quo corruption, which has historically not been found to exist in ballot issue elections. Twelve years later, in *Austin*, this Court recognized that a "different" type of corruption can result from corporate political spending – the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. This Court should grant the writ and clarify that the type of corruption recognized in *Austin* authorizes states to address the distorting effects of corporate spending on ballot issues with a carefully crafted law like I-125.

II. THE NINTH CIRCUIT FAILED TO RECOGNIZE THAT I-125 IS A NARROWLY TAILORED STATUTE THAT SERVES MONTANA'S COMPELLING INTEREST IN ADDRESSING CORPORATE SPENDING ON BALLOT ISSUES.

The Ninth Circuit panel majority found that the First Amendment does not permit I-125's limited regulation of corporate speech on ballot issues. The court's ruling failed to consider this Court's decisions recognizing the special characteristics of corporations that justify certain restrictions on corporate political activities.

Corporations are artificial entities created by law for the purpose of pursuing and furthering economic goals. Years ago a corporation was described by this Court as

"the mere creature of law, [possessing] only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence." *Dartmouth College v. Woodward*, ___ U.S. (4 Wheat.) 518, 636 (1819). To permit corporations to achieve their economic goals, the states afford them certain legal advantages, including limited liability, perpetual life, and favorable treatment of the accumulation, distribution, and taxation of corporate assets. *Austin*, 494 U.S. at 658-59.

Such advantages provided by the government "often carry with them an enhanced measure of regulation." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). In particular, this Court has long recognized that the "differing structures and purposes" of entities such as corporations "may require different forms of regulation in order to protect the integrity of the electoral process." *California Medical Ass'n v. FEC*, 453 U.S. 182, 201 (1981). A legislative body may choose to regulate corporations "to prevent both actual and apparent corruption and to address the dangers posed by corporations to the electoral process," recognizing that the "special characteristics of the corporate structure require particularly careful regulation." *FEC v. National Right to Work Comm.*, 459 U.S. 197, 209-10 (1982).

In *MCFL*, this Court observed that corporations, which are able to amass considerable wealth based on the special advantages extended to them by the state, may consequently acquire an artificial advantage in the political process. The Court also noted:

> The resources of the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make the corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

MCFL, 479 U.S. at 258. I-125 was specifically and narrowly drafted to effectuate Montana's compelling interest in preventing corporations from using their state-created advantages to obtain a corresponding advantage in the political arena. While it prohibits contributions and expenditures from the corporate treasury, I-125 does not foreclose all corporate spending on ballot issues. Subsection (3) of Mont. Code Ann. § 13-35-227 provides:

> This section does not prohibit the establishment or administration of a separate, segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation.

By permitting corporations to set up segregated funds, I-125 ensures that the *source* of corporate spending in ballot issue campaigns is money contributed by those who intend that their contributions be used for political purposes, rather than money diverted from the corporate treasury.

Focusing on the new type of corruption discussed by this Court in *Austin*, the State and the Intervenor presented extensive and compelling evidence in the district

court establishing the distorting influence of corporate money on ballot issue campaigns in Montana. The district court's conclusion that "there is no corruption or appearance of corruption in Montana ballot issue elections," *Montana Chamber of Commerce*, 28 F. Supp. at 598 (App. 46), was based on the court's restrictive application of the concept of "corruption." In arriving at its conclusion, the district court relied heavily on the testimony of Plaintiffs' expert Dr. James J. Lopach. The record clearly established, however, that in rendering his opinions Dr. Lopach employed the traditional financial quid pro quo definition of corruption. He essentially refused to acknowledge the potential for the "new" type of corruption identified in *Austin* – corruption of the political process that can result from the distorting effects of corporate wealth. (RT at 318; ER 19.) As noted above, however, in *Austin* this Court determined that it was **unnecessary** to analyze the constitutional issue in terms of the traditional, quid pro quo financial corruption that can exist in candidate elections. Instead, this Court examined the Michigan statute in light of "a *different type of corruption in the political arena*: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." *Austin*, 494 U.S. at 659-60 (emphasis added). Because of the district court's faulty analysis, its conclusion that there is no corruption in connection with the ballot issue process in Montana is not entitled to any deference.

It is worth noting that in *Austin* this Court afforded considerable deference to Michigan's legislative judgment regarding its manner of regulation of corporate political activity, focusing on the "*potential* for distortion"

that can result from the use of the corporate structure to influence the electoral process. *Austin*, 494 U.S. at 661 (emphasis added). This suggests that detailed, empirical evidence of corporate domination of the ballot issue process should not be necessary. Nevertheless the State and the Intervenor presented substantial evidence demonstrating the pervasive influence of corporate dollars on a number of Montana ballot initiatives, as well as the consequent decline in citizens' confidence in the integrity of the ballot initiative process.

For example, the evidence established that corporate money was the dominant and overwhelming factor in the defeat of at least four Montana ballot issues. I-87, known as the 1980 Montana "bottle bill," was designed to encourage recycling of beverage containers by requiring a deposit on them. The proponents of I-87 were able to raise $24,000, but they were significantly outspent by the opponents, who raised some $575,000. The opposition was funded largely by out-of-state container manufacturers, container manufacturing trade associations, and beverage companies. (Exs. 505, 506; ER 172-73, 183-89.) I-87 was defeated in the November 1980 election. One of the primary proponents of the initiative, Tony Jewett, attributed its defeat to the proportionately large amount of money spent by the opponents, funded largely by corporate dollars. (RT 638-41; ER 114-17.)

In 1988 a similar measure was proposed. I-113, the Montana Litter Control and Recycling Act, would have established a system for refundable deposits on glass, metal, and plastic beverage containers. The proponents received contributions of approximately $55,000, while the opposition was able to raise $493,000, again funded

largely by corporate interests. I-113 was defeated at the polls. (RT 1019-20; Exs. 508, 801; ER 118-20, 181-82.)

The disproportionate spending by corporate opponents was most striking in the case of I-115, proposed in 1990. A group of physicians and concerned citizens drafted the initiative which would have increased state taxes on cigarettes and other tobacco products, with the ultimate objective of reducing smoking. The proponents of I-115 managed to raise $44,000, while the opponents raised more than $1.5 million to defeat the initiative. (RT 516-20; Ex. 801; ER 96-100, 129-31.) The opposition to the initiative was funded in large part by huge monetary contributions from tobacco giants Phillip Morris Co. ($611,229), R.J. Reynolds Tobacco Co. ($282,931), Brown & Williamson Tobacco Corp. ($147,962), and the Tobacco Institute ($200,000). (Ex. 801; ER 133.) Needless to say, I-115 was defeated in November 1990. Dr. Robert Shepard, a Helena, Montana, family physician, took an unpaid leave of absence from his practice to work in support of I-115. He testified regarding his frustration in attempting to compete with the seemingly unlimited resources and money available to the opposing corporate tobacco interests:

> I came away from that initiative with a really sour taste in my mouth. The process clearly doesn't work. One immensely wealthy corporation has the opportunity to come in and pay as much money as it needs to pay to influence the voters the way it wants to influence the voters.

(RT 103-04; ER 540-41.)

> We are trying to do something for the importance – what we felt to be, was important for the

> State of Montana. We're spending time away from the campaign on fund-raising; whereas, all the other side had to do was pick up the phone and say, "Gee, R.J., can you spend [sic] me another five hundred grand today. I'm a little tapped. Thank you very much." End of fund-raising, back to work on the campaign.
>
> This is about the fact that the other side raised huge amounts of money, and I could have been three times as successful as I was in fund-raising and still lost.

(RT 556-57; ER 105-06.) It is precisely this type of "corporate domination of the political process," *Austin*, 494 U.S. at 659-60, that I-125 was intended to address.

In 1996, a citizens' group proposed I-122, which became known as the clean water initiative. I-122 would have restored more stringent water quality standards that had been weakened by the 1995 Montana Legislature. While the proponents of the initiative were able to raise $460,000, that was no match for the opponents, who raised $2.3 million and were able to defeat I-122. The vast majority of the money to oppose the initiative came from corporate mining interests. (Exs. 545, 801; ER 136-71.)

The record before the district court also includes the results of a telephone survey of 400 Montana registered voters, showing that Montana voters are very concerned about the impact of corporate contributions on the honesty and integrity of the ballot initiative process, and that they believe restrictions on corporate contributions will increase their own faith in the integrity of the initiative process. (ER 174-76, Ex. 580A.)

Thus, even though under *Austin* there should have been no need to make such an empirical showing, the record before the district court shows the extreme domination of the ballot initiative process in Montana by corporations, and the corresponding decline in citizens' confidence in the integrity of that process. This was more than sufficient to demonstrate corruption, the potential for corruption, or the appearance of corruption, in the sense of the term used by this Court in *Austin*.

Those who drafted I-125 were well aware of the historical domination of the Montana ballot issue process by corporate interests. They were also aware of this Court's decisions in *Austin* and *MCFL* and drafted a law that is precisely and narrowly tailored to comply with the teachings of those cases while addressing corporate political spending. In addition to ensuring that corporations may continue to speak through segregated funds, I-125 contains a provision exempting from its applicability any nonprofit corporation formed for the purpose, among others, of promoting political ideas, and that:

> (a) does not engage in business activities;
>
> (b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;
>
> (c) does not accept foreign or domestic for-profit corporations as members; and
>
> (d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for-profit corporations.

Mont. Code Ann. § 13-35-227(4), as amended by I-125. These criteria are obviously based on this Court's discussion in *MCFL*. In that case the Court ruled that a statute's ban on the use of corporate treasury funds for independent expenditures could not be applied to MCFL, because it possessed the following attributes that distinguished it from business corporations: (1) it was formed for the purpose of promoting political ideas and could not "engage in business activities," (2) it had no "shareholders or other persons affiliated so as to have a claim on its assets or earnings," and (3) it was not established by a corporation, and did not accept contributions from corporations. *MCFL*, 479 U.S. at 264.

I-125 was carefully drafted to address the type of corruption identified by this Court in *Austin* and *MCFL* – a form of corruption which had unquestionably been experienced in past Montana ballot issue campaigns. Under I-125, corporations are free to spend unlimited amounts of money on ballot issues, as long as the funds used for that purpose are collected from persons associated with the corporation who support the political goals of the corporation. Consistent with the principles set forth by this Court, I-125 simply regulates the *source* of the funds that a corporation may use for political purposes. Contrary to the conclusion of the Ninth Circuit panel majority, I-125 is a legitimate, constitutional statute that reflects Montana's attempt to address concerns regarding corporate spending on ballot

III. THIS ISSUE IS OF EXCEPTIONAL IMPORTANCE.

The issue of corporate spending on political campaigns has moved to the forefront of the political debate in this country. The same concerns that have led the Congress to debate the subject of so-called "soft money" contributions to national and congressional campaigns – concerns over the ability of corporations to dominate the political discussion through the use of huge corporate treasuries – led voters of Montana to adopt I-125.

The effect of the Ninth Circuit's decision is that Montana is prohibited from enforcing the law that its voters approved in 1996. The law was drafted to address the distorting effect of significant corporate political expenditures on ballot issues. The Ninth Circuit panel majority's ruling not only hamstrings the State of Montana in its efforts to regulate such expenditures, expenditures whose corrosive effects this Court explicitly recognized in *MCFL* and *Austin*; it is also significant to the many other states that have procedures for enactment of laws through initiatives or referenda.[4]

Petitioner submits that in the wake of the Ninth Circuit's decision it is highly unlikely any of those states

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[4] According to David D. Schmidt, *Citizen Lawmakers: The Ballot Initiative Revolution* (1989), in addition to Montana, twenty-four other states have procedures for enactment of laws through initiatives or referenda: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Maryland, Michigan, Missouri, Nebraska, Nevada, North Dakota, New Mexico, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming.

will endeavor to impose similar regulations on corporate spending. It is essential that this Court grant review of the Ninth Circuit's decision to ensure that Montana and other states may impose reasonable, constitutional regulations on corporate spending in ballot issue campaigns.

CONCLUSION

For the foregoing reasons the Court should grant a writ of certiorari.

Respectfully submitted,

MIKE MCGRATH
Attorney General of Montana
JAMES M. SCHEIER*
Assistant Attorney General
Justice Building
P.O. Box 201401
Helena, MT 59620-1401

**Counsel of Record*

May 2001

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MONTANA CHAMBER OF COMMERCE; SLETTEN CONSTRUCTION; LEHRKIND'S INC.; KALISPELL AREA CHAMBER OF COMMERCE; MONTANA HOSPITAL ASSOCIATION; MONTANA FARM BUREAU; MONTANA EDUCATION ASSOCIATION, *Plaintiffs-Appellees,* v. ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, *Defendant,* and LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125, *Defendant-Intervenor-Appellant.*	No. 98-36256 D.C. No. CV-97-00006-CCL
MONTANA MINING ASSOCIATION; NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; GOLDEN	No. 98-36257 D.C. No. CV-98-00037-CCL

SUNLIGHT MINES, INC.; YELLOW BAND GOLD, INC.; CONTINENTAL LIME, INC.,

Plaintiffs-Appellees,

v.

ED ARGENBRIGHT; MIKE COONEY,

Defendants,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Defendant-Intervenor-Appellant.

MONTANA MINING ASSOCIATION; NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; GOLDEN SUNLIGHT MINES, INC.; YELLOW BAND GOLD, INC.; CONTINENTAL LIME, INC.,

Plaintiff-Appellees,

v.

ED ARGENBRIGHT

Defendant-Appellant,

and

No. 98-36261

D.C. No. CV-98-00037-CCL

MIKE COONEY,

Defendant,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Defendant-Intervenor,

MONTANA CHAMBER OF COMMERCE; SLETTEN CONSTRUCTION; LEHRKIND'S INC.; KALISPELL AREA CHAMBER OF COMMERCE; MONTANA HOSPITAL ASSOCIATION; MONTANA FARM BUREAU; MONTANA EDUCATION ASSOCIATION,

Plaintiffs-Appellees,

v.

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant-Appellant,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG

No. 98-36266

D.C. No. 97-00006-CCL

2030 FUND AND CITIZENS FOR I-125,

Defendant-Intervenor.

MONTANA MINING ASSOCIATION,

Plaintiff,

and

NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; CONTINENTAL LIME, INC.,

Plaintiffs-Appellants,

v.

ED ARGENBRIGHT; MIKE COONEY,

Defendants-Appellees,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Intervenor-Appellee.

No. 99-35032

D.C. No. CV-98-00037-CCL

MONTANA MINING ASSOCIATION,

Plaintiff,

and

No. 99-35033

D.C. No. CV-97-00037-CCL

OPINION

NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; CONTINENTAL LIME, INC.,

Plaintiffs-Appellees,

v.

ED ARGENBRIGHT,

Defendant,

and

MIKE COONEY,

Defendant-Appellant.

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Intervenor.

Appeals from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted November 3, 1999
Submission Withdrawn and Deferred November 10, 1999[1]

Resubmitted Sept. 20, 2000
Filed Sept. 26, 2000

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[1] Submission of this case was deferred pending the Supreme Court's decision in *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000).

Before: Pamela Ann Rymer, Michael Daly Hawkins, and M. Margaret McKeown, Circuit Judges.

Opinion by Judge Rymer;
Concurrence by Judge McKeown;
Dissent by Judge Hawkins

COUNSEL

William Perry Pendley, Mountain States Legal Foundation, Denver, Colorado, for the plaintiffs-appellants.

James M. Scheier, Assistant Attorney General, Helena, Montana, for appellant Ed Argenbright; Daniel J. Whyte, Special Assistant Attorney General, Helena, Montana, for defendant-cross-appellant Michael Cooney.

Brenda Wright, National Voting Rights Institute, Boston, Massachusetts, and Jonathan Motl, Reynolds, Motl and Sherwood, P.L.L.P., Helena, Montana, for defendant-intervenor-appellant League of Women Voters of Montana, Montana Common Cause, MontPirg 2030 Fund and Citizens for I-125.

Stanley T. Kaleczyc and Kimberly A. Beatty, Browning, Kaleczyc, Berry and Hoven, P.C., Helena, Montana, and Stephen A. Bokat, Chamber of Commerce of the United States of America, Washington, D.C., for plaintiff-appellee Montana Chamber of Commerce; Dale R. Cockrell and Steven E. Cummings, Christensen, Moore, Cockrell & Cummings, P.C., Kalispell, Montana, for plaintiffs-appellees Montana Mining Assoc. and Yellow Band Gold, Inc.; Alan L. Joscelyn, Gough, Shanahan, Johnson & Waterman, Helena, Montana, for plaintiff-appellee Golden Sunlight Mines, Inc.

Elizabeth Brenneman, ACLU of Montana, Billings, Montana, for amicus curiae ACLU of Montana.

Karl J. Englund, Jack R. Tuholske, P.C., Missoula, Montana, for amicus curiae Montana Environmental Informatioin Center, Montanans for Common Sense Mining Laws – for I-137, and Montana Council of Trout Unlimited.

OPINION

RYMER, Circuit Judge:

These consolidated appeals involve the initiative process in Montana. Montana state officials and the League of Women Voters appeal the district court's decision, following a bench trial, that Initiative 125 (I-125), which prohibits direct corporate expenditures in ballot initiative campaigns, violates the First Amendment.[2] The Montana Mining Association and various organizations subject to I-125 sought to delay, and then to invalidate,

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[2] The lead plaintiff in the action seeking to invalidate I-125 was the Montana Chamber of Commerce (Chamber). We shall refer to Ed Argenbright, the Commissioner of Political Practices, and other state officials against whom the action was brought as "Montana"; and to organizations led by the League of Women Voters of Montana, which were intervenors in the district court, as "League." Sometimes we shall refer collectively to all parties who support I-125 and seek to have the district court's decision overturned as "I-125 Proponents." Likewise, we shall sometimes refer to those who argue for affirmance as "I-125 Opponents." The ACLU of Montana filed a brief in support of the judgment of the district court holding I-125 unconstitutional.

the election in which voters approved Initiative 137 (I-137) (restricting certain types of mining) on the ground that I-125 unconstitutionally constrained their participation in the election process. They appeal the district court's refusal to do either.[3]

We conclude that the constitutionality of I-125 is controlled by *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and that the district court did not clearly err in its findings that corporate wealth had not distorted the ballot initiative process in Montana, and that in light of those findings, the First Amendment does not permit restricting corporate speech on public issues. Accordingly, we affirm the declaration that I-125 is unconstitutional.

Whether the court should have considered (and granted) MMA's request to delay the I-137 election is moot, and we cannot say that the court erred by later declining to invalidate it. We therefore affirm the judgment in the I-137 appeal as well.

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[3] We shall refer to the parties who sought to enjoin the I-137 election (and who appeal the court's refusal to do so) collectively as "MMA" and to other parties in the same way as in the I-125 appeal. (MMA also sought to have I-125 declared unconstitutional, and its arguments in this connection are treated along with those of the "I-125 Opponents" in the I-125 appeal.) The Montana Environmental Information Center, Montanans for Common Sense Mining Laws – For I-137, and the Montana Council of Trout Unlimited filed an amicus brief in support of affirmance of the district court's refusal to delay or nullify the results of the I-137 election.

I

Montana voters approved I-125 in November 1996. I-125 amended Montana's elections law by prohibiting direct corporate spending in connection with ballot issues.[4] Specifically, the initiative amended the statutory provision concerning "[p]rohibited contributions from

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[4] Section 13-35-227 now reads [I-125 additions underlined]:

(1) *(a) Except as provided in subsection (4) a* corporation may not make a contribution or an expenditure in connection with a candidate, *a ballot issue,* or a political committee which supports or opposes a candidate, *a ballot issue,* or a political party.

(b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations.

(2) A person, candidate, or political committee may not accept or receive a corporate contribution described in subsection (1).

(3) This section does not prohibit the establishment or administration of a separate, segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation.

(4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas and that:

(a) does not engage in business activities;

(b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;

(c) does not accept foreign or domestic for-profit corporations as members; and

corporations." Mont.Code Ann. §§ 13-35-227. Under I-125, corporations (other than non-profit corporations formed for solely political purposes) are prohibited from making a contribution or an expenditure in connection with a ballot issue. Corporations may establish and administer a separate, segregated fund that is allowed to solicit contributions from shareholders, employees, or members of the corporation, but not from the company itself.

The Chamber brought an action in federal district court seeking a declaratory judgment that the initiative was unconstitutional and an injunction restraining its enforcement. The court held on summary judgment that I-125 restricted core political speech, but that a trial was necessary to determine whether a compelling state interest justified the restriction.

Meanwhile, in July 1998, I-137 was certified for the November 1998 ballot. MMA, which opposed I-137, brought suit in September 1998 requesting a preliminary injunction that would either waive I-125 as applied to it, or delay the vote on I-137 until after the I-125 case was resolved. The district court consolidated the two actions.

The I-125 trial focused on the health of the Montana initiative process. I-125 Proponents presented evidence on the effect of corporate money in four unsuccessful Montana initiatives. Witnesses testified that corporate

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(d) does not accept in the aggregate more than 5% annually of its total revenue from (foreign or domestic for-profit corporations),

(5) A person who violates this section is subject to the civil penalty provisions of 13-37-128.

opponents substantially outspent initiative proponents in these races. Advocates for the initiatives testified that they believed the defeats resulted from large corporate expenditures in opposition. Political scientists testified that large scale spending was very effective in initiative campaigns, especially when used in opposition to a ballot issue, and poll results showed that Montanans believe corporations had too much influence in elections. I-125 Opponents, on the other hand, produced evidence that a variety of factors influence election results and that the side spending less money prevailed in 50% of initiative elections. Further, they showed that Montana voter turnout was much higher than the national average, ballot drop-off was low, and the number of ballot issues remained constant over the past 20 years. Finally, I-125 Opponents offered expert testimony that the Montana political system was healthy and free from corruption.

In the I-137 phase, MMA showed that I-125 limited mining companies' ability to oppose I-137 and that I-137 was a significant economic threat to these companies. It also adduced expert testimony that a successful challenge to I-137 was no longer possible, even if the I-125 restriction were lifted, because the I-137 election was only two weeks away. Evidence on the other side showed that the mining companies spent approximately the same amount fighting I-137 as they did in their challenge to the Clean Water Bill, where the I-125 restrictions did not apply.

The district court found the I-125 Opponents' evidence credible and persuasive, accepting their expert's opinion that there is no corruption or appearance of corruption in Montana ballot issue elections. It held that I-125, perhaps facially and certainly as applied, infringes

upon the First Amendment rights of speech and association of those subject to its prohibitions; that it was not narrowly tailored to address only the campaign contributions and expenditures of large corporations; that requiring corporations to fund ballot issue campaign speech through separate, segregated funds (consisting of voluntary contributions from employees, officers, directors, and shareholders) deprives corporations of their ability to communicate political ideas directly to the electorate, which impermissibly chills their speech and association rights and precludes corporations from directly resisting potential laws that could put them out of business; that it prevents the electorate from being exposed to diverse viewpoints on public policy issues; and that the anecdotal evidence presented by I-125 proponents fails to prove that corporations could overwhelm the political speech of individual citizens in Montana to the detriment of the ballot initiative process. Accordingly, the court held, corporations are entitled to defend their economic interests by using the corporate treasury to fund their participation in ballot initiative campaigns. It therefore declared that I-125 is unconstitutional.

In this respect the court ruled in favor of MMA in the I-137 action, but it refused to enjoin the I-137 election on the ground that the relief sought was premature as of the close of evidence, October 22. On November 3, 1998, Montana voters adopted I-137 by a 53% to a 47% margin. MMA then moved to enjoin Montana from validating I-137 by certifying the election results, but the court indicated that it had already ruled and denied the motion.

Both judgments – that I-125 is unconstitutional and that the election in I-137 stands – were appealed.

By the time we heard oral argument in these consolidated appeals, the Supreme Court had granted certiorari in a campaign contribution case, *Shrink Missouri Gov't PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998), *cert. granted*, 525 U.S. 1121 (1999). We thought it prudent to defer our own decision until the Court had rendered its in *Shrink*. As it turns out, the Court's opinion, *Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897 (2000), does not affect the disposition in these appeals.

II

We determine the constitutionality of I-125 de novo. *California Democratic Party v. Jones*, 169 F.3d 646, 647 (9th Cir. 1999), *rev'd on other grounds*, 120 S. Ct. 2402 (2000). The district court's findings of fact are reviewed for clear error. *Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041, 1044 (9th Cir. 1999). While we have not previously addressed the question, we agree with other circuits that have considered similar issues that review of the district court's decision not to delay or void the I-137 election should be for abuse of discretion. *Gjersten v. Board of Election Comm'rs*, 791 F.2d 472, 479 (7th Cir. 1986) (decision to invalidate election is reviewed for an abuse of discretion); *Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir. 1978) (same).

III
I-125

Montana and League argue that corporations possess unique characteristics and legal advantages that permit them to maximize the accumulation of capital in the economic marketplace. They indicate that I-125 was

designed to assure that corporate participation in ballot initiative campaigns reflects actual public support for the corporation's political views, rather than the sheer economic power that a corporation derives from these state-created advantages. To that end, they point out, I-125 prohibits the use of corporate general treasury funds in ballot issue campaigns, while it permits corporations to participate through the use of segregated funds collected from employees, members and shareholders who wish to support the corporation's political activities. Further, they submit, I-125 is carefully tailored to adhere to the Supreme Court's rulings in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*). They fault the district court's decision on a number of fronts: for failing to recognize the compelling state interests supporting I-125 in that the court believed the only type of corruption that would justify I-125's limits was quid pro quo corruption, whereas in *Austin* the Court declined to rely on that limited anti-corruption rationale; for holding that I-125 could be justified only by evidence that money was the most important variable controlling election outcome in Montana, instead of deferring to the legislative judgement that the special benefit conferred by the corporate form presents the *potential* for distorting the political process; and for finding that voter turnout in Montana is higher than the national average, that I-125 improperly "silences" corporations under *Bellotti* because they retain the right to speak through segregated funds, and that I-125 is unconstitutional even under *Bellotti*.

The Chamber counters that I-125 abridges core First Amendment rights of political speech and association on

issues of public policy. This abridgment of political speech in the context of ballot issue campaigns (by contrast with candidate contributions or expenditures) is contrary to *Bellotti* and unjustified by any compelling state interest. Additionally, the Chamber maintains, there is no evidence of corruption or that corporate contributions or expenditures have reduced voter turnout, caused voter fall-off on the ballot, or been the principal determinant of the outcome of a ballot issue campaign; to the contrary, it submits, the evidence shows that the Montana electoral process is healthy and that the most important factor which influences outcome is the development of a credible, concise and understandable campaign message. Finally, it contends, the use of the segregated fund permitted by I-125 is neither a constitutionally permissible alternative to direct corporate speech nor an effective means to communicate core political speech on public policy issues.

We do not wish to appear to give either position short shrift, because all parties have researched, briefed and argued the issues with exceptional ability and professionalism. Yet as we see it, the constitutionality of I-125 comes down to whether restricting corporate expenditures in the ballot issue process is controlled by *Bellotti*, even though I-125 (unlike the Massachusetts statute at issue in *Bellotti*) permits corporations to establish segregated funds through which others may contribute.

Like this case, *Bellotti* involved a limitation on corporate contributions or expenditures in the ballot issue process (there, in connection with a referendum). A Massachusetts statute prohibited such expenditures "for the purpose of . . . influencing or affecting the vote on

any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation," and further provided that no issue submitted to the voters which solely concerned individual taxation issues could be deemed to affect a corporation's property, business or assets. When a graduated income tax proposal was put on the ballot, several corporate entities wanted to spend money to publicize their views in opposition. Applying strict scrutiny and requiring the state to show both a compelling interest in prohibiting the "exposition of ideas" and narrowly chosen means to avoid unnecessary abridgment, the Court held that the statute must be invalidated. In doing so, it clearly distinguished elections involving *issues* from elections involving *candidates*. As Montana does here, the state argued in *Bellotti* that preserving the integrity of the electoral process, preventing corruption, and sustaining the active involvement of citizens in good government were important state interests that were threatened by corporate participation in discussion of a referendum issue. The Court noted that if the state's

> arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.

Bellotti, 435 U.S. at 789-90 (citations omitted). It added:

> Nor are [the state's] arguments inherently persuasive or supported by the precedents of this Court. Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing."

Id. at 790 (citations omitted).[5] Concluding that the statute prohibited protected speech in a manner unjustified by a compelling state interest, the Court invalidated it.

In *Austin*, the Court considered a Michigan statute that prohibited corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state

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[5] The Court analogized corporate speech on ballot issues to lobbying by corporations, which the First Amendment protects, *see California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-511 (1972); *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961), *id.* at 791 n. 31, and noted that "the direct participation of the people in a referendum, if anything, increases the need for the widest possible dissemination of information from diverse and antagonistic sources." *Id.* at 790, n. 29 (citations and internal quotes omitted).

office, but did not prohibit corporations from making such expenditures from segregated funds used solely for political purposes. The Court acknowledged that requiring corporations to make independent political expenditures only through special segregated funds burdens corporate freedom of expression because "the corporation is *not* free to use its general funds for campaign advocacy purposes," *Austin*, 494 U.S. at 658 (quoting *MCFL*, 479 U.S. at 252), but held that the state's rationale in supporting a regulation aimed at "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" was compelling. *Austin*, 494 U.S. at 660. The Court concluded that "the State's decision to regulate only corporations [was] precisely tailored to serve the compelling state interest of eliminating . . . the corrosive effect of political 'war chests.' " *Id.* at 666. It therefore upheld Michigan's restriction on independent corporate expenditures in connection with candidate elections for state office.

Justice Brennan, who concurred in the majority's opinion, wrote separately, distinguishing the particular provisions at issue in *Austin* that prohibit corporations from using treasury funds only for independent expenditures in candidate elections, from the restrictions at issue in *Bellotti*, noting that "[a] corporation remains free, for example, to use general treasury funds to support an initiative proposal in a state referendum." *Id.* at 676 (Brennan, J. concurring). So did Justice Stevens, who observed that, "as we recognized in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L.Ed.2d

707 (1978), there is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other." *Austin*, 494 U.S. at 678 (Stevens, J., concurring).

Montana and League are correct that I-125 is similar to the statutory scheme approved in *Austin* to the extent that both statutes allow corporations to set up segregated funds. However, as we read the Court's opinions, *Austin* does not turn on this difference from *Bellotti* so much as it does on the difference between expenditures for candidate elections and ballot issues. As the Court explained, in the context of candidate elections, "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Id.* at 660. It is also true that the Court indicated in *Bellotti* that through a record or findings, Congress or a state might be able to demonstrate the danger of real or apparent corruption posed by corporate expenditures, 435 U.S. at 787 n. 26 and 789-90, whereas in *Austin* the Court appears to have accepted the state's articulated interest in avoiding corruption without a record or findings, 494 U.S. at 659-60, 666. But again, this appears to reflect the difference between restrictions on the corporate voice in public issue elections, and in partisan candidate elections.

Even if *Austin* may plausibly be read as undermining *Bellotti*, this is for the Supreme Court, not us, to say. As the Court has instructed, " '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its

own decisions.' " *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). *Austin* cited *Bellotti* and did not overrule it. Therefore, we believe that *Bellotti* is still good law, and controls.

There is no question that a law requiring corporations to make independent expenditures (even for candidates) through a segregated fund burdens corporate expression. *Austin* and *MCFL* so recognize. The burden is even greater when the limitation has to do with independent expenditures in the ballot issue process, as speech on such issues is "at the heart of the First Amendment's protection." *Bellotti*, 435 U.S. at 776.

Because the state's interest in preventing corporate wealth from distorting the political process is not obvious or compelling in connection with ballot issue elections, *Bellotti*, 435 U.S. at 789-92, the district court in this case heard considerable evidence, both empirical and expert. It found that "the state has failed to produce evidence that would support a judicial finding that corporate wealth has dominated citizen voices to the detriment of the ballot initiative process." As there was evidence pointing in each direction, we cannot say the court clearly erred in finding that there was no imminent threat to the democratic process.

It follows that I-125 unconstitutionally restricts public discussion in the ballot issue (initiative) process. As the Court concluded in *Bellotti* with respect to the Massachusetts statute, we conclude here that, " '[a] restriction so destructive of the right of public discussion [as I-125], without greater or more imminent danger to the public

interest than existed in this case, is incompatible with the freedoms secured by the First Amendment.' " *Id.* at 792 (quoting *Thomas v. Collins*, 323 U.S. 516, 537, (1945)).[6] Its enforcement was, therefore, properly enjoined.

IV

I-137

Having determined that I-125 is unconstitutional, we must decide whether the district court should have delayed or invalidated the I-137 election. Although we have previously held that challenges to election procedures should be made before the election occurs, *see Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176, 1180-81 (9th Cir. 1988) (post-election challenge came too late); *Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1008 (9th Cir. 1978) (parties must bring complaints forward for preelection adjudication), we have not expressly considered whether it is error for a court to refuse to resolve such challenges on the footing that a pre-election challenge is premature. Nor do we need to do so now, for this issue, together with the question whether MMA's pre-election request for injunctive relief should have been granted, are moot.

This leaves only the question whether the district court erred in refusing to invalidate the election. A state election violates due process "if it is conducted in a manner that is fundamentally unfair." *Bennett v. Yoshina*,

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[6] Given this conclusion, we need not reach the question of whether I-125 is "sufficiently tailored" to meet compelling state interests.

140 F.3d 1218, 1226 (9th Cir. 1998). Of course, "the voiding of a state election is a 'drastic if not staggering' remedy." *Soules*, 849 F.2d at 1180 (quoting *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir. 1967)). In determining whether to void an election, we balance the constitutional violation against the "countervailing equitable factors" such as "the extremely disruptive effect of election invalidation and the havoc it wreaks upon local political continuity." *Soules*, 849 F.2d at 1180.

Here, even though there was evidence that I-125 had affected MMA's ability to campaign, there was also evidence that it had no substantial impact. Eleven days remained before the election after the district court lifted the I-125 restrictions. And the state has a significant interest in avoiding the costs of a special election. In these circumstances, we cannot say that the district court abused its discretion in failing to void the results of the election.

AFFIRMED.

McKEOWN, Circuit Judge, concurring:

I join in the opinion but write separately to underscore that First Amendment protection of political contributions is not absolute. Here, in light of the specific evidence presented and in light of the requirements of *First National Bank of Boston v. Bellotti*, 435 U.S. 765, (1978), the state failed to sustain its burden of articulating a compelling interest for the restrictions. This is not to say, however, that such compelling interests do not exist, even

in the context of initiative elections. The Supreme Court's recent treatment of the evidentiary burden is instructive:

> The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.

Nixon v. Shrink Missouri Government PAC, 120 S. Ct. 897, 907 (2000). Although *Shrink* concerned candidate elections, its reasoning on judicial scrutiny of state-asserted compelling interests applies with similar force to campaigns for ballot measures.

Legitimate policy concerns have prompted legislators to address the power of the corporate contributor. I believe that a statute may be carefully crafted and tailored to meet a compelling interest in preserving the integrity of the electoral process, such as where contributions so distort the political process that they undermine our democratic system. But that is a case for another day.

HAWKINS, Circuit Judge, dissenting:

We occasionally hear a case falling so squarely between two conflicting Supreme Court opinions that no matter which way we veer, we are likely to run aground. This is one of those cases. With *Bellotti* and *Austin*, the Supreme Court has laid out a difficult course for us to navigate in determining whether restrictions on corporate campaign spending are constitutional. Judge Rymer

works her way admirably through this challenge, but in the end I am not convinced. At the risk of running off course myself, I choose a different line because I think it is more consistent with the development of Supreme Court precedent in this area and reflects a more sensitive understanding of the ways in which corporate spending can distort the electoral process. Although certainly not dispositive, this approach has the added benefit of upholding the expressed discernment of the people of Montana about these matters.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court's first major campaign spending case, the plaintiffs challenged the Federal Election Campaign Act, which placed dollar limits on political contributions to candidates and on individual expenditures "relative to a clearly identified candidate."[1] The Court held that the contribution limits were constitutional because the government has a compelling interest in eliminating corruption (or its appearance) in the electoral process, and the restrictions did not completely preclude individuals or groups from expressing their support of a particular candidate. *See id.* at 26-29. But the limits on individual expenditures were struck down. These restrictions, the Court held, could not

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[1] The Act also limited campaign spending by candidates for various federal offices and spending for national conventions by political parties. It required that contributions and expenditures over a certain amount be reported and publicly disclosed, established a system for funding Presidential elections, and created the Federal Election Commission to monitor and enforce these regulations. *See Buckley*, 424 U.S. at 7.

be justified by the government's interest in battling corruption because independent spending in candidate elections presents little risk of quid pro quo bargaining. *See id.* at 45-47.

Shortly afterward, the Court decided *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which involved a complete ban on corporate spending in referenda campaigns. Here, as in *Buckley*, the government argued that the restriction was justified by its interest in battling corruption and in preserving the integrity of the electoral process. *See id.* at 788-89. The Court disagreed. "Referenda are held on issues, not candidates for public office," the Court stated. *See id.* at 790. And while a candidate may offer political favors in return for campaign contributions, a referendum cannot. As a result, "[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *Id.*

Buckley and *Bellotti* focused much attention on the government's asserted interest in preventing quid pro quo corruption. Indeed, in a subsequent case, the Court stated that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985).

But twelve years after *Bellotti*, the Court was presented with a new asserted interest. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), a state statute prohibited corporations from using general treasury

funds to make independent expenditures in candidate elections, but allowed them to set up segregated campaign funds to which employees, shareholders, and members could contribute. *See id.* at 655-56. Because the statute targeted campaign expenditures, not contributions, the state could not justify it as a measure to fight quid pro quo corruption. *See Buckley*, 424 U.S. at 45-47. So instead, the state argued that "the unique legal and economic characteristics of corporations" created the risk of a different kind of corruption not based on political dealmaking.

Four years earlier, the Court had itself identified this "new" form of corruption. In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) ("*MCFL*"), the Court explained that state laws grant corporations special advantages that not only allow them to play a dominant role in the economy, but permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace." The Court elaborated:

> The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

Id. at 258.

The Court nonetheless struck down the corporate spending limits in *MCFL* as applied because the plaintiff

was an ideological organization "formed to disseminate political ideas, not to amass capital." *Id.* at 259. But the plaintiff in *Austin*, the Michigan Chamber of Commerce, possessed several characteristics that made it more like a corporation and less like a nonprofit ideological group. *See Austin*, 494 U.S. at 662-665. So the Court applied the analysis it had articulated in *MCFL* to uphold the statute.

Michigan's statute, the Court made clear, did not aim at traditional quid pro quo corruption. *See id.* at 659. It targeted "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. "The unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures," the Court stated. *Id.* "Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We therefore hold that the state has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations." *Id.*

Austin did not expressly overrule *Bellotti;* in fact, Justice Marshall's opinion remained conspicuously silent about the relevance of its holding for state referenda.[2] But most observers have concluded that the Court's analysis

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[2] The opinion cited *Bellotti* only four times and exclusively on mundane issues.

undermines the distinction between candidate elections and referenda, which was the key to *Bellotti*. Although the traditional quid pro quo corruption may not be a problem in referenda, it is difficult to see why the distorting effects of corporate wealth – the "new corruption," as it has been called – would not be equally problematic in both contexts. Once *Austin* was decided, therefore, the natural conclusion was that a similar restriction on corporate spending in state referenda would be upheld in spite of *Bellotti*. *See* Thomas C. Goldstein, *Corporate Influence in Referenda: A Comment About the Prescription*, 1996 Ann. Surv. Am. L. 469, 473 (1996) (stating that "the Court in *Austin* substantially reversed course from *Bellotti*" and that "the expenditures in *Austin*, which were not coordinated with the candidate, were the rough equivalent of spending in referenda."); James B. Raskin, *Direct Democracy, Corporate Power and Judicial Review of Popularly-Enacted Campaign Finance Reform*, 1996 Ann. Surv. Am. L. Rev. 393, 408 (stating that a ban on corporate spending in ballot initiatives is "perfectly congruent with the Court's new and far more nuanced conception of 'corruption' "); Gerald G. Ashdown, *Controlling Campaign Spending and the New Corruption: Waiting for the Court*, 44 Vanderbilt Law Review 767, 779 (1991) ("The conclusion is inescapable that legislatures are now free to restrict corporations to spend only from separate political funds *in ballot measures as well as candidate elections.*") (emphasis added); David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 Yale L. & Pol'y Rev. 236, 252 (1991) ("[I]f corruption includes the distorting effects of large amounts of wealth on the political debate, corruption is no less troubling in referenda than in candidate

elections. Thus, this distinction also seems destined to fall in light of the *Austin* Court's redefinition of corruption.").

Judge Rymer resists this conclusion. Although the Montana initiative is identical to the *Austin* statute in that it permits corporations to spend from a segregated fund – something the *Bellotti* statute did not allow – she asserts that the relevant distinction is between laws that regulate spending in candidate elections and laws that target spending in ballot initiatives or referenda. (Majority Op. at 12341). She does not explain how this traditional distinction survives *Austin*'s identification of a new form of corruption unrelated to quid pro quo bargaining. She only quotes *Austin*'s statement that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." (Majority Op. at 12341). This statement, however, does not suggest that corporate wealth plays a greater role in candidate elections than in referenda. It merely describes the effect of corporate wealth in elections generally.

Judge Rymer appears to recognize this difficulty. As a result, she attempts to find support for her position in the concurring opinions of Justices Brennan and Stevens in *Austin*. She suggests that Justice Brennan relied on the same distinction between candidate elections and referenda campaigns that she relies on here. Justice Brennan, she points out, noted that under the *Austin* statute, "a corporation remains free, for example to use general treasury funds to support an initiative proposal in a state referendum." (Majority Op. at 12340). The implication is that Justice Brennan's vote turned on the limited scope of the *Austin* statute.

A closer reading of Justice Brennan's statement undermines this implication. When Justice Brennan made this statement, he was responding to the dissent's claim that the statute was under-inclusive. He first acknowledged that the statute "is concededly under-inclusive insofar as it does not ban other types of political expenditures to which a dissenting . . . corporate shareholder might object." *Austin*, 494 U.S. at 675-76. He then explained: "The particular provision at issue prohibits corporations from using treasury funds only for making independent expenditures in support of, or in opposition to, any candidate in state elections. A corporation remains free, for example, to use general treasury funds to support an initiative proposal in a state referendum." *Id.* at 676.

The context of Justice Brennan's statement makes clear that he did not think the limited scope of the statute (i.e. that it did not restrict corporate spending in state referenda) was what saved it. In fact, he recognized that the statute's under-inclusiveness was problematic. He then argued that this under-inclusiveness was not fatal because candidate elections are at the heart of political debate and the state can choose to single out corporate spending in that context. *See id.* at 676-77. He never suggested, however, that the state could not go further and limit corporate spending in referenda or ballot initiatives. Nor did he suggest that what distinguished *Austin* from *Bellotti* was that the latter involved referenda. To the contrary, he explained that *Bellotti* was different because it involved a complete ban on corporate spending, while *Austin* allowed for a segregated fund. *See id.* at 670 n. 1 ("In [*MCFL*], we observed that the requirement that

expenditures be made through PACs 'is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in' *First National Bank of Boston v. Bellotti.*").

Justice Stevens did distinguish *Bellotti* from *Austin* on the ground that one involved referenda and the other involved candidate elections. *See id.* at 678. But that is because he rejected *Buckley*'s conclusion that restrictions on campaign expenditures were not justified by the government's interest in preventing quid pro quo corruption. *See id.* Therefore, he did not need to rely on the government's new asserted interest – that corporate wealth distorts the electoral process. And because he relied on the traditional corruption rationale, he could make the same distinction the Court made in *Bellotti.* Justice Stevens' views are interesting, but because he was the sixth vote to uphold the statute, they shed little light on the majority's holding.

Finally, Judge Rymer argues that when a Supreme Court opinion directly applies to a case, we must follow it even if the opinion's reasoning was undermined by a later Court decision. (Majority Op. at 12341). This is a serious argument no doubt. *Bellotti* has not been overruled, and the facts of this case are similar to *Bellotti:* both involve restrictions on corporate spending in state referenda. The problem is that while the facts of the two cases are similar, there is also a significant difference. The Montana initiative – like the statute in *Austin* – allows for corporate spending through a segregated fund, while the *Bellotti* statute banned corporate spending entirely. Thus, to say we must follow the case that directly applies begs

the question: which case applies when both share a common and important feature with the case before us? In such a situation, we should not simply assert that one case directly applies and then ignore the other. We must do our best to reconcile the two. And in my opinion, the best way to reconcile these cases is to acknowledge that *Austin* identified a new rationale for limiting corporate campaign spending that does not turn on whether candidate elections or ballot initiatives are at issue. In addition, the statute in *Austin* was less objectionable than the statute in *Bellotti* because it allowed for corporate spending through a segregated fund. Because the initiative also allows for a segregated fund, I think it is justified by Montana's asserted interest in eliminating what its people have determined to be distorting effects of corporate wealth on the electoral process.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA CHAMBER OF COMMERCE, SLETTEN CONSTRUCTION COMPANY, LEHRKIND'S, INC., KALISPELL AREA CHAMBER OF COMMERCE, MONTANA HOSPITAL ASSOCIATION, MONTANA FARM BUREAU FEDERATION, MONTANA EDUCATION ASSOCIATION,

Plaintiffs,

-v-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

CV 97-6-H-CCL

(Filed Nov. 20, 1998)

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, GOLDEN SUNLIGHT MINES, INC.,

CV 98-37-H-CCL

and YELLOW BAND GOLD, INC.
and CONTINENTAL LIME, INC.,

Plaintiffs,

-v-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, and MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

OPINION and ORDER

These two cases (hereinafter *Montana Chamber* and *Montana Mining Ass'n*, respectively) seek declaratory judgments and injunctive relief invalidating Initiative 125, and the *Montana Mining Ass'n* suit seeks similar relief as to Initiative 137. The court granted limited consolidation of the two cases by setting down serial trials with both cases to be tried before the court decided either, and with all agreeing that all evidence in the *Montana Chamber* case was also before the court in the *Montana Mining Ass'n* case. The cases came on regularly for trial on the merits on October 13 and October 21, 1998,

respectively. In the case of *Montana Mining Ass'n*, a hearing on Plaintiffs' motions for preliminary injunction was merged with the trial.

The court has jurisdiction over both cases pursuant to 28 U.S.C. § 1331 (federal question). Having shown an invasion of a legally protected interest, a causal connection between the injury and the matter complained of, and a likelihood that the injury can be redressed by a favorable decision, *see Lee v. State of Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997), the Plaintiffs in both cases (with one exception) have standing to litigate their complaints. All parties in the *Montana Chamber* case agree that Plaintiff Montana Education Association ("MEA") no longer has standing and ought to be dismissed from the case because the MEA has disincorporated to avoid the restrictions imposed by Initiative 125.

After receiving the evidence in both trials and after considering the arguments of all the parties, the court ruled from the bench on October 22, 1998, finding in favor of the Plaintiffs in both cases as to the unconstitutionality of I-125 but denying the injunction against I-137 sought by the Plaintiffs in the *Montana Mining Ass'n* case. The following opinion explains the court's reasoning and also shall stand for the court's findings of fact and conclusions of law. Fed. R. Civ. P. 52(a).

Background

Since 1975, a total prohibition against all corporate contributions or payments to Montana ballot elections has been considered to be an overbroad, blanket infringement of corporations' First Amendment rights. *C & C*

Plywood Corp. v. Hanson, 420 F. Supp. 1254 (D. Mont. 1976), *aff'd* 583 F.2d 421 (9th Cir. 1978). In *C & C Plywood*, the circuit panel began its review with the fundamental proposition that political speech is "at the heart of the First Amendment's protection." *Id.* at 423 (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)). In affirming the district court's decision, the circuit panel also relied upon *Bellotti* for the rule that corporate speech is protected by the First Amendment unless a compelling state interest can be shown that justifies the abridgment. *Id.* at 423-25. The panel noted that corruption is not an issue in nonpartisan ballot issue elections (at least in the sense of *quid pro quo* corruption, which is generally defined as an attempt to buy political favors from candidates by individuals or corporations). *Id.* at 425. Thus, from 1975 until 1996 Montana corporations have been permitted to make contributions and expenditures to support or oppose ballot issues in Montana.

In 1996, however, Montana voters approved Initiative 125 ("I-125"), which amends Mont. Code Ann. § 13-35-227 and provides as follows:

> (1) (a) Except as provided in subsection (4), a corporation may not make a contribution or an expenditure in connection with a . . . ballot issue, or a political committee which supports or opposes a . . . ballot issue.
>
> (b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations.
>
> . . .
>
> (4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection

with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas, and that:

(a) does not engage in business activities;

(b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;

(c) does not accept foreign or domestic for-profit corporations as members; and

(d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for-profit corporations.

The codification of I-125 was itself amended by the 55th Legislature by means of House Bill 575, effective April 17, 1997, which amendment deleted the exception regarding nonprofits (§13-35-227(4)) and expanded the class of entities affected by I-125 from corporations to include partnerships, associations, cooperatives, and other organizations. *See* Mont. Code Ann. § 13-35-236 (1997). On February 18, 1998, this court granted the *Montana Chamber* Plaintiff's summary judgment motion as to Count VI of their Amended Complaint, and in so doing declared that H.B. 575 was an unconstitutional and unenforceable abridgement of Plaintiffs' First Amendment freedoms of speech and association. This partial summary judgment decision left open the question whether I-125 itself violates the First Amendment and is therefore unconstitutional and unenforceable. This issue was set for trial to allow Plaintiffs to present their case and particularly to permit Defendants to present evidence to support their contentions that a compelling state interest justifies the speech restrictions imposed by I-125.

Evidence at Trial

Plaintiffs presented documentary evidence and witnesses, including Robert Brown, Robert Gannon, David Owen, Eric Feaver, Jerome Anderson, James Lopach, Herbert Alexander, Ed Argenbright, and Robert Moore.

Sen. Bob Brown, director of the campaign committee supporting Referendum 113, the Six Mills Levy University Funding Initiative, testified extensively regarding the manner in which I-125 hampered his ability to raise funds for R-113. Sen. Brown testified that many corporations, both for-profits and non-profits, were not contributing to this initiative campaign as they had in the past because of fear of running afoul of I-125, and that as a result the campaign committee lacked funds with which to educate Montanans about R-113.

Robert Gannon, Chairman of the Board, CEO, and President of Montana Power Company ("MPC"), testified persuasively regarding the inability of MPC to utilize its employee political action committee (the "MPC PAC") to respond to ballot initiatives that might threaten MPC's economic interests. Although no such ballot initiatives were qualified for the 1998 election cycle, three petitions were circulated that would have had major effects upon MPC's electric restructuring process. Mr. Gannon explained that little time is available to respond to a ballot initiative question, that he is the ultimate decision-maker regarding MPC's ballot initiative strategy, and that large amounts of money could be required to mount effective campaigns against ballot initiatives threatening MPC's interests. The MPC PAC is not an effective vehicle for this purpose, for the MPC PAC collects only about

$15,000 in funds each year (which funds are distributed to legislative candidates). The MPC PAC is controlled by a diverse committee of employees, and it therefore cannot make campaign strategy decisions as quickly as can a single individual such as the CEO of MPC. The MPC PAC therefore expresses the political positions of the employees who contribute to it; the MPC PAC does not, is not designed to, and really cannot express the political positions of MPC itself. (About half of MPC's shareholders are corporations who likewise are prohibited under I-125 according to Mr. Gannon.)

Mr. Gannon also testified that because of I-125 he was uncomfortable expressing his personal opinions in any public forum regarding a ballot issue such as R-113. Such public expressions of private sentiments might be misconstrued as a forbidden corporate in-kind contribution to the R-113 ballot issue campaign because, as President of MPC, Mr. Gannon is widely viewed as MPC's spokesperson, and he is compensated by MPC to express its views. Thus, Mr. Gannon's personal speech has been chilled in the context of ballot issue debates due to I-125.

David Owen, President of the Montana Chamber of Commerce, testified that his ability to perform his political duties as Chamber president has been all but extinguished. Most of the Montana Chamber of Commerce members are corporations; therefore a Chamber PAC would not be an effective vehicle to raise and manage ballot issue contributions and expenditures because the corporate Chamber members would be prevented from contributing to the PAC by I-125. Mr. Owen testified that he cannot travel around the state and speak to the membership of service clubs regarding ballot issues because

these audiences contain non-Chamber of Commerce members, making such travel and speaking arrangements a prohibited in-kind contribution to a ballot issue campaign. Neither can Mr. Owen be interviewed or participate in radio or television debates on ballot issues. Neither can Mr. Owen write editorials to express the political views of the Montana Chamber of Commerce regarding ballot issues, much less organize campaigns and coalitions to promote or fight ballot issues. The Montana Chamber is even reluctant to take official positions in its own newsletter for fear of communicating with non-members in violation of I-125. Like Mr. Gannon, Mr. Owen testified that his personal political speech about ballot issues has been chilled due to his concern that his speech might be attributed to the Chamber of Commerce, for which he is obviously a spokesperson.

Eric Feaver, the President of the Montana Education Association ("MEA") testified that the MEA relinquished its incorporated status in order to fight Constitutional Initiative 75 ("CI-75"), a ballot issue calling for a requirement that all taxes be put to a popular vote. Although the primary function of the MEA is to organize collective bargaining for its 10,000 members, the MEA also markets insurance and health care to its members, as well as conducting other miscellaneous business enterprises. In addition to its primary advocacy, the MEA engages in legislative lobbying and ballot issues campaigning. Although the MEA has created a PAC fund for ballot issues, and through that fund the MEA has raised over $30,000 for ballot issue campaigns, Mr. Feaver testified that the MEA was unable to raise through its PAC the amount of money it requires to fight CI-75. Because I-125

would have stifled MEA's right to political speech its corporate entity was dissolved to escape the prohibition.

Jerome Anderson, opposition campaign director for I-115 in 1990 and I-122 in 1996, testified that he does not believe that sheer dollars are the ultimate factor in an opposition campaign. Instead, Mr. Anderson believes that the defeat of other initiatives (I-115 and I-122) depended upon the development of credible, persuasive messages which were consistent with the values of a majority of voters. Mr. Anderson testified that I-125 has curtailed the free flow of information in ballot issue campaigns. As an example, he asserted that technical reports obtained from corporations for use as campaign literature in the I-122 opposition campaign could not be used after the passage of I-125 because they would be prohibited in-kind contributions to a ballot issue campaign. Mr. Anderson also noted that this was the quietest general election campaign season he can recall observing.

The testimony of Dr. James Lopach, professor of political science at the University of Montana, was particularly enlightening. Dr. Lopach has extensively studied Montana politics, electoral politics, voting behavior, and ballot elections. Dr. Lopach's expert opinion is that there is no corruption in the Montana political system. Not only is Dr. Lopach unaware of any actual corruption in Montana politics, but also he is unaware of any issue giving rise to the appearance of corruption in the eyes of the voters.

Dr. Lopach testified that Montana's political process is very healthy in that there is a proper degree of party competition, high voter turnouts, and low voter fall-off

on the ballot. Montana's voter turnout is approximately 15% higher than the national average. Voter falloff, which is defined as the failure of voters to vote from the top to the bottom of the ballot, is quite low, and in some instances voters have had a higher participation in ballot issues (at the bottom of the ballot) than in major candidate races, as in 1996 when 97.3% of the voters participated in the I-122 ballot but 97.1% of the voters participated in the governor's race.

Dr. Lopach testified that money is not the principal determinant of ballot issue campaigns. Dr. Lopach's opinion is that I-125 has had the negative effect of cutting off meaningful political speech. Although money is one factor influencing ballot issue campaigns, and media advertising is another, Dr. Lopach believes that political predisposition is primarily responsible for voting behavior. Thus, there is no credible evidence that corporate money is dominating citizen voices to the detriment of Montana's ballot initiative political process.

Dr. Lopach's testimony was echoed by Dr. Herbert Alexander, former director of the Citizens Research Foundation and professor emeritus of political science at the University of California, Berkeley. Dr. Alexander testified that neither money nor media advertising is the principal determinant of outcome in ballot issue elections. Dr. Alexander believes that Initiative 125 makes bad public policy because it removes a significant voice (i.e., that of corporations) which should be heard during ballot issue campaigns.

Secretary of State Mike Cooney, the State of Montana's Chief Election Officer, testified that there is no evidence of corruption in Montana politics in the form of buying or selling votes or tampering with election results. There is no evidence that corporate contributions or expenditures made in connection with ballot issues have reduced voter turnout or caused voter falloff on the ballot. Instead, the ballot issues in which the most money has been expended generally have had the highest voter participation.

Defendants likewise presented documentary evidence and witnesses, including Ed Argenbright, Joseph Kerwin, Dulcy Hubbert, Robert Shepard, Dennis Alexander, C.B. Pearson, Tony Jewett, Stan Frasier, John Deardourff, Mike Cooney, Samantha Sanchez, and William Chaloupka.

Dr. Robert Shepard, a Helena Physician who was one of the proponents of Initiative 115, testified regarding the difficulties the I-115 citizens' group faced in communicating their message regarding the I-115 tobacco tax. There is no doubt that Dr. Shepard was thoroughly disenchanted by the experience of campaigning against the campaign machine funded by out-of-state tobacco companies. Regrettably, Dr. Shepard testified that he will not work for another ballot issue campaign as a result of his experience with I-115. On cross-examination, Plaintiffs questioned Dr. Shepard whether proponents' failure to convince the voters to support I-115 might have been due in part to proponents' mistakes, questioning whether proponents' strategy might have been poorly planned,

whether proponents' political experience was insubstantial, and whether proponents' fund-raising techniques might have been inadequate.

The court also received testimony from Tony Jewett, executive director of the Montana Wildlife Federation, who testified regarding his experience in 1980 as a proponent of Initiative 87, a recycling initiative, and his involvement in Initiative 122, a clean water initiative. Mr. Jewett testified to feeling discouraged by his experiences with I-87 and I-122 because citizen proponents could not raise comparable funds to purchase media advertising as could their corporate opponents. Likewise, Mr. Stan Frasier testified to his experience as the Helena area captain of Initiative 122. From that experience, Mr. Frazier feels that citizens cannot win against corporate money in ballot issue campaigns.

John Deardourff testified regarding a survey taken by his polling firm which indicates that Montana citizens are displeased generally because of their perception of excessive corporate spending during ballot issue campaigns.

On direct examination by Defendant-Intervenor, Secretary of State Mike Cooney testified that he believes that corporate dollars are corrupting Montana's ballot initiatives and causing people to walk away from that political process. Secretary Cooney testified that I-125 brings reasonable limits to excessive spending, levels the playing field for citizens and corporations, and promotes an equal amount of communication from both sides. However, when questioned by Plaintiffs' counsel, Secretary Cooney

acknowledged that voter statistics do not show that Montanans are turning away from the ballot initiative process or elections in general.

Ms. Samantha Sanchez is the executive director of the National Institute on Money in State Politics. Ms. Sanchez claims to be an expert in the area of campaign contributions, and she studies the comparative rations of campaign contributions by analyzing contributions patterns, source, and quantity. Ms. Sanchez testified regarding contributions from out-of-state corporations in certain ballot issue elections compared to overall contributions and expenditures and compared to contributions and expenditures in other statewide and local elections.

Dr. William Chaloupka opined that (expensive) repetitive media advertising works and that political campaigns rely upon rhetoric and imagery, communicated by various media, to persuade voters to adopt a particular point of view. Dr. Chaloupka, a professor of political science at the University of Montana, has not specialized in the area of Montana ballot initiatives.

The court also received testimony from witness C.B. Pearson, a former executive director of Common Cause of Montana, and the campaign manager for Initiates 114, 118, and 125. Mr. Pearson is quite familiar with Montana's ballot initiative process, having personally participated in that process and having authored a monograph on the subject, "Big Money in Montana Ballot Campaigns (1982-1994)."

Mr. Pearson testified that he believes that the domination of corporate dollars is an abuse of the ballot initiative process and that corporate money discourages

citizens from proposing ballot issues. Specifically, Mr. Pearson testified that his analysis of Montana ballot issue elections shows that in nine initiatives wherein proponents were outspent by a 2/3 margin, seven of the nine initiatives (77%) were defeated. On cross-examination, Plaintiffs showed that when all ballot initiatives are considered wherein one side outspend the other side by a 2/3 margin, the side outspending won ten times and lost nine times.

Discussion

Having considered all the evidence submitted by the parties, the court finds Plaintiffs' evidence to be credible and persuasive. The court accepts the expert testimony provided by Dr. Lopach, who asserted there is no corruption or appearance of corruption in Montana ballot issue elections and that this Montana political process is healthy and of sound integrity. The court accepts the testimony of both Drs. Lopach and Alexander that many factors influence election outcome, particularly the political values, predispositions, and party loyalty of the voters, and that neither money nor media advertising is the sole or even the single most important variable controlling election outcomes. The court accepts the testimony of Plaintiffs' witnesses that Initiative 125 deprives corporations of the ability to communicate their political views during ballot issue campaigns.

The court finds the defense witnesses who testified regarding their participation in ballot issue campaigns to be sincerely motivated and public-spirited persons. Some

of these witnesses appear to have had unfortunate experiences by being involved in issue campaigns in which their sides lost and the other side had a disproportionate amount of funds. Apparently these witnesses have made the leap in logic that they lost solely because of the opposing side's funds, which the court considers to be an unwarranted but all too human conclusion. The collective sincerity of these witnesses inclines the court to a sympathetic view of their testimony, but they simply have not proven their contention by a preponderance of the evidence.

Of course money can and does have a potential effect on the outcome of elections. It is one of many factors. Multiple variables other than money and media influence election outcomes Montana ballot issue elections are not corrupted by the political expressions of corporations. The ballot issue process in Montana is healthy and not corrupt. Montana has no compelling state interest which would justify the abridgement of First Amendment rights imposed by Initiative 125.

The court concludes first and foremost, that Initiative 125, perhaps facially and certainly as applied, infringes upon the First Amendment rights of speech and association of the Plaintiffs and others subject to the prohibitions contained therein. Initiative 125 is not narrowly tailored to address only the campaign contributions and expenditures of large corporations. The reported aim of its drafters was to catch the big fish – shut off the large campaign warchests. But the net cast by Initiative 125 arguably also catches tens of thousands of little fish, individual Montanans who have banded together to enhance their political speech through organizations such

as the Montana Education Association, the Montana Stockgrowers Association, the Montana Wool Growers Association, the Montana Chamber of Commerce, the Montana Farm Bureau, the Montana Hospital Association, the Montana Medical Association, the Montana Taxpayers' Association, and others.

"A major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S 214, 218 (1966). The First Amendment therefore protects political expression, and in so doing "serves significant societal interests" and "often protects interests broader than those of the party seeking their vindication. . . . " *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 766 (1978). Thus, the proper question is whether a particular type of expression deserves First Amendment protection. *Id.*

Requiring corporations to fund ballot issue campaign speech through separate, segregated funds (consisting of voluntary contributions from employees, officers, directors, and shareholders), as is required by Initiative 125, deprives corporations of their ability to communicate political ideas directly to the electorate. The corporate voice is silenced. Initiative 125 chills impermissibly the speech and association rights of corporations and their officers and employees. Initiative 125 precludes corporations from directly resisting potential laws that could put them out of business. Requiring shareholders to fight the corporation's battles is an ineffective and illegal substitution for corporate speech rights. Perhaps almost as important, Initiative 125 prevents the electorate from being exposed to diverse viewpoints on public policy issues.

The State of Montana, which is represented by Defendant and Defendant-Intervenor, must show a compelling state interest to justify a significant infringement of core First Amendment rights. *Colorado Repub. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 609 (1996). Leveling the playing field by equalizing the strength of citizen speech relative to corporate speech is inconsistent with First Amendment purposes and principles. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). To accomplish the necessary showing, the State must demonstrate the existence or appearance of corruption, which the court defines to include real harm to the integrity of Montana's ballot initiative process. Real harm does not include "wasteful and excessive campaign spending." *Colorado Republican Federal Campaign Committee*, 518 U.S. at 617. While it may be conceivable that corporations could overwhelm the political speech of individual citizens in a particular case to such a degree that the integrity of the ballot initiative process itself is damaged, *see Austin v. Michigan Chamber of Commerce*, 494 U.S 652, 661 (1990), the meager anecdotal evidence presented by the Defendants wholly fails to prove that such has occurred in Montana. The State has failed to show that corporate contributions or expenditures in ballot initiate campaigns have had any adverse effect on the integrity of Montana's political process. Specifically, the State has failed to produce evidence that would support a judicial finding that corporate wealth has dominated citizen voices to the detriment of the ballot initiative process.

Corporations are therefore entitled to defend their economic interests by resorting to the corporate treasury to fund their participation in ballot initiative campaigns.

Like individuals, unions, and associations, corporations are entitled to attempt to shift public opinion and voting behavior to favor the corporate point of view, and in fact this is the primary purpose of all political speech, *see Bellotti*, 435 U.S. at 790. It is up to the voters to determine whether they approve or disapprove of a corporation's point of view. The purpose of the First Amendment is to allow "each person [to] decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence." *Turner Broadcasting System, Inc. v. Federal Communication Commission*, 512 U.S. 622, 641 (1994).

The popular sentiment among Montana voters may be that there is too much corporate money influencing ballot issue campaigns and also that it is exceedingly difficult for ordinary citizens to participate successfully in some ballot issue campaigns. However, the law of the United States is that political speech is protected by the First Amendment, and this rule of law benefits all Montanans. The court is sensitive to the complaint that I-125 represents the will of the people. As a matter of law, however, it is simply not relevant that Initiative 125 was enacted by the voters rather than the legislature, "because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981).

In order to promote open and informed discussion of public affairs, the First Amendment seeks to "protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). Under the law of the United States, that protection is

granted to political speech without regard to its source, whether individual, corporation, union, or other association. Freedom of speech regarding public affairs is one of the cornerstones of self-government. "And self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.' " *New York Times Co. v. Sullivan*, 376 U.S 254, 266 (1964) (*quoting Associated Press v. United State*, 326 U.S. 1, 20 (1945)).

Accordingly,

IT IS HEREBY DECLARED that Initiative 125 is unconstitutional and therefore null and void, with no legal force or effect. The State of Montana is directed to cease its enforcement of the provisions of Initiative 125. Judgment shall be entered in Plaintiffs' favor in both *Montana Chamber* and *Montana Mining Ass'n*, although in the latter case the court denies the Plaintiffs' preliminary injunction notion as to Initiative 137 because the relief sought was premature as of the close of evidence.

Each party shall bear its own fees and costs.

IT IS FURTHER ORDERED that the complaint in *Montana Chamber* is DISMISSED as to Montana Education Association for its lack of standing to sue.

The Clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 20th day of November, 1998.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

UNITED STATES DISTRICT COURT

HELENA DIVISION DISTRICT OF MONTANA

MONTANA CHAMBER OF COMMERCE, et al

JUDGMENT IN A CIVIL CASE

V.

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, et al

CASE NUMBER: CV 97-6-H-CCL
FILED NOV 20 1998

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Initiative 125 is unconstitutional and therefore null and void, with no legal force or effect. The State of Montana is directed to cease its enforcement of the provisions of Initiative 125. Judgment in [sic] entered in Plaintiffs' favor. Each party shall bear its own fees and costs.

November 20, 1998
Date

Lou Aleksich, Jr.
Clerk

/s/ Gayle Reuterdahl
(By) Deputy Clerk

UNITED STATES DISTRICT COURT

HELENA DIVISION DISTRICT OF MONTANA

MONTANA MINING ASSOCIATION, et al

JUDGMENT IN A CIVIL CASE

V.

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, et al

CASE NUMBER: CV 98-37-H-CCL
FILED NOV 20 1998

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Initiative 125 is unconstitutional and therefore null and void, with no legal force or effect. The State of Montana is directed to cease its enforcement of the provisions of Initiative 125. Judgment in [sic] entered in Plaintiffs' favor. Each party shall bear its own fees and costs.

November 20, 1998
Date

Lou Aleksich, Jr.
Clerk

[SEAL]

/s/ Gayle Reuterdahl
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA CHAMBER OF COMMERCE, SLETTEN CONSTRUCTION COMPANY, LEHRRIND'S, INC., KALISPELL AREA CHAMBER OF COMMERCE, MONTANA HOSPITAL ASSOCIATION, MONTANA FARM BUREAU FEDERATION, MONTANA EDUCATION ASSOCIATION,

Plaintiffs,

-v-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

CV 97-6-H-CCL

OPINION AND ORDER

FILED FEB 18, 1993

Before the court is Plaintiffs' motion for summary judgment. This court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 2201. The court, having carefully reviewed the briefs and supporting documents, and having heard the parties' arguments at hearing, is prepared to rule.

BACKGROUND

In 1906, Montanans voted by a six-to-one margin to establish an initiative and referendum ("I&R") process by which citizens might propose new laws and petition to have such proposals considered by all Montanans in a ballot election. Sometimes called "direct democracy," the I&R process encourages citizens to participate in the political process and supposedly allows ideas generated at a grassroots level to be put to popular vote instead of being filtered through the legislative process. Approximately 24 states have similarly enacted an I&R process. Pl.'s Mem. Supp. Summ. J., Alexander Aff. at 5.

In 1912, Montanans passed the Corrupt Practices Act (through the initiative process), the general purpose of which was to limit corporate spending in Montana politics. Among the limitations enacted was the prohibition of corporate spending in the I&R process, and for some sixty years corporate spending was prohibited in the I&R process in Montana. However, in 1972, in *State ex rel. Nybo v. District Court of the First Judicial District*, 492 P.2d 1395, 1399 (1972), the Montana Supreme Court interpreted the relevant Montana statute, § 23-4744, R.C.M. (1947), not to contain an I&R corporate spending prohibition. That Court reasoned that a statute prohibiting corporate payments or contributions intended to promote or defeat any political party or organization could not apply to initiatives and referenda, which are a part of the legislative process.

In response, the Montana legislature amended § 23-4744 in 1975, this time making explicit its prohibition of corporate spending in the I&R process. The penalty for

corporate spending in ballot elections was substantial: such a corporation could be fined up to $10,000 and lose its corporate charter if organized under the laws of the State of Montana, or, if a foreign corporation, be enjoined from transacting business in the state. 23-4768 R.C.M. (1947).

This 1975 law was tested in *C & C Plywood Corn. v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976), *aff'd* 583 F.2d 421 (9th Cir. 1978), which held that a total prohibition against *all* corporate contributions or payments to ballot elections was an overbroad, blanket infringement of corporations' First Amendment rights. Thereafter, until 1996, it was clear that corporations were permitted to spend money to promote or oppose Montana ballot issues.

In the November 1996 general election, however, Montana voters approved Initiative 125, which provided as follows:

> (1) (a) Except as provided in subsection(4), a corporation may not make a contribution or an expenditure in connection with a . . . ballot issue, or a political committee which supports or opposes a . . . ballot issue.
>
> (b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations.
>
> . . .
>
> (4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas, and that:

(a) does not engage in business activities;

(b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;

(c) does not accept foreign or domestic for-profit corporations as members; and

(d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for-profit corporations.

Corporations making contributions or expenditures in violation of I-125 are subject to civil penalties in an amount up to $500 or three times the amount of the unlawful contribution or expenditure, whichever is greater. Mont. Code Ann. § 13-37-128.

I-125 was amended by House Bill 575, effective upon passage when signed by Governor Marc Racicot on April 17, 1997. H.B. 575 expands the class of entities affected by I-125 from corporations to include all non-profits, partnerships, associations, cooperatives, and other organizations. *See* Mont. Code Ann. § 13-35-236 (1997). The same civil penalties apply to this expanded class of affected entities. *See* Mont. Code Ann. § 13-37-128 (1997) .

Plaintiffs filed their First Amended Complaint on May 16, 1997, seeking a judicial determination that I-125 violates Plaintiffs' constitutional right to engage in political speech and association (Count I), including their right to make contributions and expenditures in support of or in opposition to ballot issues. Count II asserts that I-125 is void for vagueness, both facially and as applied, because it fails to define "business activities" that nonprofit corporations must not engage in if the prohibition of I-125 is

not to be applied to those nonprofits. Count III asserts that I-125 is void for vagueness, both facially and as applied, because it fails to define "corporations," "for-profit corporations" or "nonprofit corporations," and thus it has a chilling effect upon business organization which may or may not be subject to the prohibitions of I-125. Count IV claims that I-125 is overly broad, constituting an unconstitutional deprivation of Plaintiffs' due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. Count V alleges that I-125 violates Plaintiffs' right to Equal Protection guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution in that I-125 does not apply to unincorporated entities such as labor organizations, and there is no compelling state interest to make such a distinction. Count VI alleges that H.B. 575 violates Plaintiffs' rights of free speech and association protected by the First Amendment to the United States Constitution.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Under Rule 56(c) of the Federal Rules of Civil Procedure, a district court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Ninth Circuit, guided by the United States Supreme Court, has set the following standard for consideration of summary judgment motions: "If the party moving for summary judgment meets its initial burden of identifying for the

those portions of the materials on file that it believes demonstrates the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in rule 56, 'specific facts showing that there is a genuine issue for trial.'" *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (*quoting* Fed.R.Civ.P. 56(e) and *citing Celotex v. Catrett*, 106 S. Ct. 2548, 2553 (1986)). In considering specific facts offered by the non-moving party, the district court does not make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the non-moving party. *T.W. Elec. Serv.*, 809 F.2d at 630-31 (*citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986)).

A "material" fact for Rule 56 purposes is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S., 242, 248-49 (1986).

Rule 56(c) requires a court to enter summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). A mere scintilla of evidence in support of the non-movant's position is insufficient: "[T]here must

be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252.

APPLICABLE LAW GOVERNING CAMPAIGN FINANCE

In analyzing the conflicting claims of the parties, the court begins by examining the substantive law governing Plaintiff's claims. In their facial challenge to § 13-35-236, Plaintiffs face a "heavy burden" to show that the statute challenged can never be applied constitutionally. *Rust v. Sullivan*, 500 U.S. 173, 183, 111 S. Ct. 1759, 1767, 114 L.Ed.2d 233 (1991) ("The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.").

In balancing the competing interests involved in *C & C Plywood Corp. v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976) (holding that complete prohibition on corporate spending for ballot elections was impermissible infringement of corporations' First Amendment rights), *aff'd* 583 F.2d 421 (9th Cir. 1978), the district court found that the governmental interest in the integrity of the political process was outweighed by a corporation's right to communicate information and ideas and the electorate's right to receive corporations' information and ideas. *C & C Plywood Corp.*, 420 F. Supp. at 1264. The district court relied upon *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (holding ceilings on candidate contributions permissible but independent expenditure ceilings impermissible), for its recognition that, in the election context, media communication is the most effective political speech and also

the costliest, but that without such communication the electorate cannot be well-informed. *Buckley*, 424 U.S. at 19. Thus the First Amendment protects the "uninhibited, robust, and wide-open" debate that is required to allow private citizens to make informed choices among candidates. *Id.* Following *Buckley*, the Montana federal district court also rejected the idea of governmental management of the referendum process in an attempt to equalize financial disparities between various groups. *C & C Plywood Corp.*, 420 F. Supp. at 1265 (*citing Buckley v. Valeo*, 424 U.S. at 49).

In affirming the district court decision in *C & C Plywood*, the Ninth Circuit panel relied upon a newer United States Supreme Court decision, *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 55 L.Ed.2d 707, 98 S. Ct. 1407 (1978), which, unlike *Buckley*, specifically addressed ballot measures. *See C & C Plywood Corp. v. Hanson*, 583 F.2d 421, 423 (9th Cir. 1978). *Bellotti* confirmed that corporations as well as individuals have First Amendment rights, and that complete prohibitions of corporate spending on ballot issues is a blanket infringement of First Amendment rights. *Bellotti*, 435 U.S. at 784-86.

In *Bellotti*, the Court examined a Massachusetts statute prohibiting corporations from directly or indirectly contributing any money to influence the vote on any question submitted to the electorate unless the property, business, or assets of the corporation were materially

affected by the vote. *Bellotti*, 435 U.S. at 767.[1] The Massachusetts statute also prohibited any officer or agent acting on behalf of the corporation to contribute money to ballot issues. *Id.* at n.2. The plaintiffs, two banking associations and several business corporations, wished to spend money to advertise their disapproval of a referendum authorizing the Massachusetts legislature to enact a graduated personal income tax. *Id.* at 748. The Supreme Court held that the statute violated plaintiffs' First Amendment right of free speech as made applicable to the States by the Fourteenth Amendment, finding that this abridgment was not justified by a compelling state interest. *Id.* at 776.

In examining the governmental interests at stake, the Court discussed Massachusetts' interest in sustaining citizen participation in ballot elections, noting that it is through their election activities that citizens develop a confidence in government. *Id.* However, the Court found that Massachusetts had failed to show that corporate voices had overwhelmed or even significantly influenced state referenda and that the state had also failed to show that there was any threat to citizens' confidence in the

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[1] The statute further specified that "[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation," thus completely prohibiting corporations from spending money on tax-related ballot questions. *Bellotti*, 435 U.S. at 768. The penalties for violating this statute were fines of up to $50,000 for a corporation, $10,000 for a corporate officer, director, or agent, or imprisonment up to one year, or both a fine and imprisonment. *Id.*

government. *Id.* at 789-90. In addition, the Court found that the state's prohibition on corporate speech was not narrowly tailored to the state's interest in protecting shareholders who hold views divergent from the corporate viewpoint. *Id.* at 728. And finally, the risk of corruption perceived by the Court in partisan candidate elections was not present in the case. *Id.* at 787-88.

In the *Bellotti* dissent, Justice White (joined by Justices Brennan and Marshall) argued that the state's regulatory interest is itself derived from the First Amendment, meaning that the right of citizens not to be overwhelmed by corporate speech is a competing First Amendment interest. *Id.* at 803-04.[2] The dissent also notes that at that time some 18 states prohibited or limited corporate contributions to ballot elections. *Id.* at 803 n.1. The *Bellotti* dissent also distinguishes corporate speech, which is the expression of an artificial entity, from the principal types of speech protected by the First Amendment: "the use of communications as a means of *self*-expression, *self*-realization, and *self*-fulfillment, is not at all furthered by

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[2] This viewpoint is echoed today in opinions disfavoring the *Buckle* equation of money with speech and question whether corporate money actually helps to create a political marketplace of ideas. For example, in his dissent to *Clifton v. FEC*, 114, F.3d 1309, 1319 n.6 (1997) (dissent), Senior Judge Bownes argues that

> [in] reality, however, *Buckley's* equation of money and speech does not serve the goal of ensuring that the best ideas emerge from a true (and fair) competition among differing viewpoints. Rather than rewarding people or candidates who put forward good ideas, this system rewards people who happen to control vast amounts of money.

corporate speech." *Id.* at 804-05 (emphasis added). The dissent argued that

> [e]ven complete curtailment of corporate communications concerning political or ideological questions not integral to day-today business functions would leave individuals, including corporate shareholders, employees, and customers, free to communicate their thoughts. Moreover, it is unlikely that any significant communication would be lost by such a prohibition. These individuals would remain perfectly free to communicate any ideas which could be conveyed by means of the corporate form. Indeed such individuals could even form associations for the very purpose of promoting political or ideological causes."

Id. at 807.

Noting that corporations are artificial entities created by law to achieve economic goals, not to use its "wealth to acquire an unfair advantage in the political process," the dissent concludes that "[t]he State need not permit its own creation to consume it." *Id.* at 809. Finally, the dissent pointed out that the federal Corrupt Practices Act, enacted in 1907 and barring corporate contributions to federal elections, had already been recognized by the Court to have been motivated by the desire "to avoid the deleterious influence on federal elections resulting from the use of money by those who exercise control over large aggregations of capital." *Id.* at 812 (*quoting United States v. Automobile Workers*, 352 U.S. 567, 585 (1957)).

Justice Rehnquist, in his separate dissent to *Bellotti*, argued that states are not required by the Fourteenth Amendment "to endow a business corporation with the

power of political speech" because in his view business corporations only possess the rights and properties expressly or incidentally conferred by their charters of creation. *Id.* (Rehnquist dissent) at 749 n.6. Justice Rehnquist rejected the view that the free-flow of information was in any way diminished by the State of Massachusetts' limitation of corporate speech (as opposed to the speech of natural persons) in ballot elections. *Id.* at 828.

Despite these dissenting opinions, with *Bellotti*, the law of corporate expenditures for ballot elections was clearly established and has remained so to this day. In fact, this is a small and somewhat unique niche in elections law generally, because ballot issue elections are not permitted by federal elections law and fewer than half of all states allow ballot issue elections. Montana law has clearly permitted corporate expenditures in the context of ballot issue elections since *Nybo* and *C & C Plywood*.

Nevertheless, there have been interesting parallel developments in federal elections law with the growth of independent expenditures during candidate election campaigns. Independent expenditures, unlike contributions to candidates, are expenditures that are not solicited by, directed by, or coordinated with a candidate or political party. *Buckley v. Valeo*, 424 U.S. 1, 36-37, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam). Two recent cases in the area of independent expenditures, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S. Ct. 616,93 L.Ed.2d 539 (1986) ("MCFL"), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 664-65, 110 S. Ct. 1391, 1400, 108 L.Ed.2d 652 (1990), exemplify the partial transition of modern-day campaign finance from the traditional

financial support for candidates to the newer methods of independent expenditure. *See also Colorado Republican Fed. Campaign Comm. v. FEC*, ___ U.S. ___, ___, 116 S. Ct. 2309, 2319, 135 L.Ed.2d 795 (1996).

In *MCFL*, the court examined a federal statutory ban on corporate contributions prohibiting independent expenditures used to expressly advocate the election or defeat of a candidate. *MCFL*, 479 U.S. at 248, 93 L.Ed.2d at 550. The Court held unconstitutional, as applied to MCFL, a statute precluding a nonprofit corporation from making independent expenditures expressly advocating election or defeat of a candidate, without first having channeled its money through a segregated fund. *MCFL*, 479 U.S. at 263, 93 L.Ed.2d at 560.

However, the Court expressly rested its holding on the premise that MCFL possessed certain characteristics satisfying a three-part test: (1) the non-profit's express founding purpose is to promote political ideas and not to conduct business, (2) no shareholders or other persons have a claim on the non-profit's assets or earnings, and (3) the non-profit was not established by a business corporation or labor union and its policy is not to accept contributions from such entities. *MCFL*, 479 U.S. at 263-64, 93 L.Ed.2d at 560.

The Court's holding (that a nonprofit corporation such as MCFL could make independent expenditures out of its general treasury) is tempered, however, by the Court's prompt acknowledgment of "the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace." *Id.* at 263. The

Court also distinguished the facts in *MCFL* from *Bellotti*'s absolute prohibition on corporate spending from the Massachusetts law restricting corporate spending to the use of segregated funds. *Id.* at 259 n.12.

Recognizing the problem of large influxes of corporate money into the political marketplace, the Court stated that

> [r]elative availability of funds is after all a rough barometer of public support. The, resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

MCFL, 479 U.S. at 258, 93 L.Ed.2d at 556. Accordingly, actual corruption, as in quid pro quo corruption (payments to candidates for future favors), has never been the sole concern of the court. In *Buckley v. Valeo*, wherein the court discussed the impact of large individual contributions to candidates, the Court noted that the government has a compelling interest extending beyond quid pro quo corruption: "[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption[3] stemming from public awareness of the opportunities for abuse inherent in a regime of

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[3] In *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97, 84 L.Ed.2d 455, 105 S. Ct. 1459 (1985) (NCPAC), the Court stated that "preventing corruption *or the appearance of corruption* are the only legitimate and compelling

large individual financial contributions." *Buckley*, 424 U.S. at 27, 96 S. Ct. at 638-39. The appearance of corruption is significant because it directly impacts citizen confidence in our political and electoral systems.

In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 108 L.Ed.2d 652, 110 S. Ct. 1391 (1990), the Court recognized that our political system can be undermined not only by the appearance of (quid pro quo) corruption but also by yet another type of corruption resulting from "vast reservoirs of capital" that "distort[ ] the political process" and do not reflect voters' evaluation of the merits of political ideas. *Austin*, 494 U.S. at 661, 110 S. Ct. at 1398. The Court noted with particularity the special privileges granted to corporations by state law that allow corporations to amass wealth: limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets. *Austin*, 494 U.S. at 658-59, 110 S. Ct. at 1396-97.

Austin involved a Michigan statute prohibiting corporations from using general treasury funds for independent expenditures favoring or opposing candidates for political office. The state statute did permit such independent expenditures to be made from PAC funds. The Michigan Chamber of Commerce, however, a non-profit corporation having many members that are for-profit corporations and requiring dues of all members, and having both political and non-political purposes and activities, was deemed by the Court not to fall within the *MCFL*

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government interests thus far identified for restricting campaign finances" (emphasis added).

exception for politically-oriented non-profits. Therefore, the Court held that the Michigan Chamber could be required to make independent expenditures through a PAC fund rather than directly from the Chamber's general treasury. *Austin*, 494 U.S. at 660.

Within the Court's strict scrutiny analysis of this burdening of the Michigan Chamber of Commerce's First Amendment rights, the compelling state interest found by the Court was Michigan's interest in regulating "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. The state thus has the right to "ensure[ ] that expenditures reflect actual public support for the political ideas espoused by corporations." *Id.* Even though *Austin* did not involve candidate contributions but independent expenditures, the Court left no doubt that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Id.*

DISCUSSION

Defendant and Intervenor argue that this court should apply the *Austin* standard to the instant case in determining whether the Montana statute regulating corporate expenditures for ballot issue elections violates the First Amendment. Defendant and Intervenor analogize

the independent expenditures involved in a ballot election to the independent expenditures involved in a candidate election. They argue that the U.S. Supreme Court, having defined a new compelling state interest to accommodate independent expenditures cases, has departed from the requirement that governments show a danger of quid pro quo corruption to justify restricting and regulating independent expenditures. Defendant and Intervenor ask this court to apply the new standard as outlined in *Austin* whereby a government may show a compelling interest justified by the danger of corruption of elections due to the corrosive and distorting effect of immense aggregations of wealth accumulated through the corporate form.

Plaintiffs, on the other hand, argue that *Bellotti* controls this case, meaning that there is a bright-line distinction between ballot issue cases and candidate campaign cases (whether candidate contribution cases or independent expenditure cases). Plaintiffs urge the court to disregard *MCFL* and *Austin* because those cases, albeit independent expenditure cases, arise in the context of candidate campaigns – and thus can be categorized as addressing the traditional underlying danger of quid pro quo corruption.

However, simply by examining *Bellotti* this court is able to discern two fundamental differences in that case from the instant case. First, *Bellotti* involved an absolute prohibition on corporate speech in ballot elections not involving property, assets, or operations of the corporation. The instant case, however, examines a Montana statute that merely restricts corporate speech to the use of

money from segregated funds.[4] Second, the *Bellotti* court did not create a bright-line division between ballot questions and candidate elections, stating instead that "[i]f appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. [citation omitted] But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government." *Bellotti*, 435 U.S. 789-90, 55 L.Ed.2d 707, 726. Thus, *Bellotti* left open the door for the factual development urged by Defendant and Intervenor today.

"Preserving the integrity of the electoral process, preventing corruption, and 'sustain[ingl the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." *Bellotti*, 435 U.S. at 725 (*quoting Buckley v. Valeo*, 424 U.S. at 25); *see also United States v. Automobile Worker*, 352 U.S. 567, 570, 1 L.Ed.2d 563, 77 S. Ct. 529 (1957).

The segregated funding regulation imposed upon business corporations by I-125 is not an absolute ban on corporate speech as was the case in *Bellotti* or in *Citizens*

---

[4] The court notes Defendant Argenbright's contention that Montana's reporting requirements applicable to segregated funds are not nearly as burdensome as the federal requirements. *See* Mont. Code Ann. § 13-37-201 *et seq.*

Against Rent Control v. Berkeley, 454 U.S. 290 (1981). Similarly, federal and state PAC fund regulations that limit independent expenditures and direct contributions to candidates do not impose an absolute ban on corporate speech. *See Austin*, 494 U.S. at 660-61. Nor is I-125 an attempt to equalize financial resources among political groups (for there is no ceiling on the amount a corporation can spend on ballot issues through its segregated fund), but to regulate the political use of economic resources accumulated by privileges granted by the state in order to prevent corruption and distortions of the political marketplace of ideas. Finally, the segregated fund regulation imposed by I-125 is narrowly tailored to satisfy Montana's compelling interest in protecting the integrity of its political system while yet permitting corporate speech by the officers, directors, shareholders, and other employees or members of corporations. This is so because the regulation is "precisely tailored" to the state's intent to "eliminat[e] from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations." *Austin*, 494 U.S. at 666, 108 L.Ed.2d at 669.

The court rejects Plaintiffs' argument that I-125 violates the Equal Protection Clause in that it focuses its regulatory burden upon business corporations and provides an exception for certain non-profit corporations while ignoring partnerships, associations, and other unincorporated entities. Similarly I-125 is not underinclusive because it does not apply the same restrictions to unincorporated entities that it applies to corporations. These arguments have been disposed of in *Austin*. *See Austin*, 494 U.S. at 665-66, 108 L.Ed.2d at 668. The court also

rejects Intervenor's argument that the court may not rule on certain issues, such as the constitutionality of H.B. 575 as applied to partnerships and other entities not represented by Plaintiffs because when it is clear that the law would be unconstitutional under the overbreadth doctrine, the court need not have before it that particular party-plaintiff to so rule. *New York v. Ferber*, 458 U.S. 747, 768-70, 102 S. Ct. 3348, 73 L.Ed.2d 1113, 1129-31 (1982); *see also* Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1.

As to Counts Two and Three, the court rejects Plaintiffs' argument that I-125 is void for vagueness because it fails to define what business activities a nonprofit must not engage in (Count II) and because it fails to define "corporation," "for-profit corporation," or "nonprofit corporation" (Count III).

Turning, then, to the factual basis for Defendant and Intervenor's arguments as to Count I, the court examines what facts might exist to support a compelling state interest. Plaintiffs' expert, Herbert Alexander, director of the Citizens' Research Foundation at the University of Southern California and professor of political science, attests to his belief that "it takes money to illuminate the issues in a ballot campaign" and "[t]oo little money in the campaign process can be extremely harmful." Alexander Aff. at 6. Prof. Alexander also believes that "[i]t is better public policy to permit freedom to give directly in support of or opposition to ballot initiatives." Alexander Aff. at 9. In a Supplemental Affidavit responding to Intervenor's affidavits, Prof. Alexander opines that Intervenor's affidavits are insufficient to support a theory that there is a causal relationship between money spent and election outcomes. Alexander Supp. Aff. at 3.

Intervenor asks the court to scrutinize four ballot initiatives in which large corporate contributions allegedly overwhelmed citizens voices, presumably resulting in the defeat of these citizen-sponsored ballot initiatives.

Intervenor presents the affidavit of Dr. Robert Shepard, of Helena, Montana, who in 1990 took a sabbatical from his medical practice to volunteer on behalf of I-115. This initiative proposed to levy a tax on the sale of tobacco. Dr. Shepard states that he believed that people would benefit from the reduction in tobacco use resulting from higher priced products. Dr. Shepard testifies that the citizen's group promoting the initiative raised $40,000 to support I-115, but they faced 16 corporate entities (including R.J. Reynolds, Philip Morris, and the Tobacco Institute) that funded an opposition campaign with $1,500,000.00. The largest contribution received by the citizen's group was a $9,345 cash and $3,282 in-kind contribution from the American Cancer Society, a non-profit corporation from Atlanta, Georgia. Over 50 Montana physicians contributed to the I-115 citizens group.

However, the corporate side spent 99.7% of all funds expended for the I-115 ballot issue. "The campaign was funded by money from tobacco companies including over $600,000 from Philip Morris of New York, NY; over $300,000 from R.J. Reynolds of Winston-Salem, NC; and over $200,000 from the Tobacco Institute, a non-profit industry advocacy group from Washington, DC. In total 16 corporate entities spent or gave over $1,500,000 against I-115." Shepard Affidavit at 2.

Dr. Shepard's feelings about the ballot election process in which he directly participated are as follows:

> I recall one instance when I went (taking time as a volunteer from my practice) to Butte to debate a professional lobbyist who was paid more ($60,000) for his work against I-115 than our entire side had for our entire campaign. I recall how unfair I thought the process was. I thought it was unfair because any debate (free media) was provided equally to both sides while the corporate side bought an overwhelming amount of paid media in which it argued its side without rebuttal from our side.
>
> I believe that the initiative process is good in concept as it allows citizens to place issues, like the tobacco tax, on the ballot for direct lawmaking. It is important to have that option because the legislative route is politically closed due to the presence of an extensive lobby funded by the tobacco interests.
>
> However, the ability of corporations to directly spend money from the corporate treasury on initiatives denies fair play in the initiative process. To these large corporations $50,000 of corporate money is not significant. To ordinary Montana citizens that kind of money is not there.
>
> Based on my experience with I-115 I believe that the unlimited use of corporate funds corrupts the fairness of the process by allowing the corporate side to make virtually unlimited arguments using corporate money which cannot be responded to by the citizen side.

Aff. Robert Shepard, 13 Oct. 1997, at 2-3. Moreover, Dr. Shepard notes that polling performed by newspapers showed that there was strong public support for I-115 initially and throughout much of the campaign. Shepard Affidavit at 2.

The next affidavit is submitted by Tony Jewett, of Helena, Montana, who worked on behalf of I-87, the 1980 "bottle bill." In this ballot election, corporate opponents spent $575,000 as opposed to the proponents' $26,000, so that corporations spent 99.6% of all funds spent during the I-87 campaign. Again, Jewett states that polls indicated initially that, two to one, the public favored I-87, and Jewett attributes the election loss "in large part to the enormous use of big business corporate money and resources." Jewett Affidavit, 14 Oct. 97, at 2. The corporate funding. including $67,000 from the Can Manufacturer's Institute; $51,000 from Owens-Illinois; $27,000 from Coca-Cola, Inc.; $26,000 from the Glass Packaging Institute; and $25,000 from Pepsico, Inc.., and 70 other business corporation or trade association contributions. Jewett Aff. at 2.

Jewett attests that "[d]uring September and October of 1980 the I-87 proponents had to endure virtually nonstop media advertising against I-87. The arguments raised against I-87 could have been rebutted and therefore I-87 support may have persevered if it had been possible for proponents to respond. However, because of the disparity in funds the proponents could not respond and the only arguments many people heard were the ones paid for by the opponents." Jewett's perception of the initiative process has been negatively colored by his direct experience in the process: "The initiative process

was, in my judgment, skewed and made unfair by such a one sided access to funds in amounts far beyond that which an ordinary Montana person could hope to donate to any initiative." Jewett Aff. at 2-3.

A bottle bill initiative (I-113) was again presented to Montana voters in 1988, and Brad Martin, of Helena, Montana, discussed in his affidavit the fact that 200 corporations contributed $500,000 against I-113, expending 90% of the total funds spent on this initiative campaign. Contributors opposing I-113 included Coca-Cola Company, Atlanta, Ga. ($35,000 cash and $11,400 staff/travel); Pepsi-Cola Company, Somers, NY ($35,000 cash and $4,100 staff/travel); Anheuser-Busch Companies, Inc., St. Louis, MO ($8,400 cash and $36,300 staff/travel); Can Manufacturers Institute Legislative Committee, Washington, DC ($44,160), Industry Union Glass Promotion Program, Washington, DC ($77,000 cash and $7,100 staff/travel). Martin notes that even beverage truck drivers carried anti I-113 materials on their routes through Montana, and six-packs of beverages in stores carried orange anti I-113 stickers on them.

As to his perception of the initiative process in which he participated, Brad Martin states that

> I believe that I-113 lost because the corporate side was able to use its corporate trucks, employees, and money to work against I-113 without restriction. I believe that in a fair debate I-113 would have passed into law. . . .
>
> I do not object to a corporation or its people speaking out in regard to I-113. What I do object to is the use of the corporate funds and corporate property during the campaign as it gives an

> unfair advantage to those who control the corporate property. In effect, the corporate wealth slams the door on citizens seeking to use the initiative process. That is just plain wrong as the initiative process was supposed to be a safety valve for citizens who believe they were shut out of legislative system dominated by lobbyists and other political insiders.

Jewett Aff. at 4-5.

During the 1996 general elections, Stan Frasier, of Helena, Montana, volunteered for a citizens group that proposed I-122, an initiative that would have restored more stringent water quality standards which had been lessened by the 1995 Montana legislature. This citizens group was well-organized and actively sought to obtain the kind of funds it would need to compete with corporate opposition. In fact, the citizens group raised over $460,000 from over 700 individuals, 50 non-profit organizations, and over 20 for-profit corporations. The citizens group proposing I-122 mounted a media campaign with print and electronic advertising, and polls showed strong public support, both initially and through summer and early fall of 1996.

Corporate opposition came in the form of $2,000,000 in cash and in-kind contributions from the mining corporations affected by water quality discharge standards: ASARCO ($350,000); Golden Sunlight Mine, Inc. ($350,000 cash and $39,000 in-kind); Pegasus Gold Corp. ($210,000 cash and $160,000 in-kind); Seven-Up Pete Joint Venture ($500,000 cash and $27,000 in-kind); and over 100 other for-profit corporate contributions. It is note-worthy that just one corporate contribution, made by the Seven-Up

Pete Joint Venture, exceeded the entire campaign funding of the citizens group.

Corporate opponents ran a media campaign (radio, television, newspaper advertising) in June, July, and August, 1996. Nevertheless, public approval for I-122 held throughout the opposition campaign, until the public was subjected to a media blitz in September and October, 1996.

Stan Frasier's impressions of his citizen participation in the ballot initiative process in Montana are as follows:

> The citizen groups chose the initiative route with I-122 because the people in those groups believed that the corporate lobbyists had such influence at the Montana legislature that citizen voices were not being heard. In 1995 the legislature had, over strong protest from citizens, weakened the Montana water quality standards that I-122 sought to restore.
>
> I believe that the mining corporations ability to spend money from the corporate checkbook and use corporate staff and resources to oppose I-122 was the sole reason that I-122 failed. The issue failed because it was not possible for the citizen side (as organized as it was) even to come close to matching those resources. I believe that this great unfairness of use of for-profit corporate money has skewed and corrupted the ballot process to the point where it now belongs to for-profit corporations and not to ordinary people.
>
> The ballot process has long been part of Montana's political system. I believe it hurts the

> system when for-profits can spend from the corporate treasury as corporations did on I-122.

Frasier Aff. at 3-4.

Defendant Argenbright informs the court that 24 ballot measures were placed before Montana voters since 1982, and in one case there was no reported spending. Of the remaining 23 ballot measures, in 14 such elections the side that reported spending the most money prevailed. *See* Hubbert Aff. at TT 5-7. In 11 of those 14 ballot elections, the prevailing side spent 92 percent or more of the total amount of money spent on that particular ballot measure. Intervenor points out that statistical averages are not meaningful because corporations do not always take an interest in ballot initiatives. But when they do, argues Intervenor, they almost always win with big money. C.B. Pearson, past executive director of the Montana Public Interest Research Group, past executive director of Common Cause of Montana, and co-author of "Big Money and Montana's Ballot Campaigns," Sept. 1996 (Montana Public Interest Research Foundation) (attached to C.B. Pearson's affidavit), states in his affidavit that "[s]ince the mid 1970s corporate money has done exactly what was feared in 1912 – corporate money has dominated the initiative process whenever an issue of concern to a for profit corporate entity has been placed on the ballot." Affidavit of C.B. Pearson, October 13, 1997, at. 4.

Plaintiffs assert that Rule 701, Fed. R. Evid., prohibits this court from considering the affidavits presented by Intervenor because the affidavits contain speculation by lay witnesses as to the reasons behind certain election

outcomes. Plaintiffs argue that these affiants are not qualified to testify as to what voters were thinking or why they thought as they did when they voted, making affiants' opinions inadmissible. Plaintiffs' argue incorrectly that Rule 701 prohibits lay opinion testimony concerning the mental state of another. *See Bohannon v. Pegelow*, 652 F.2d 729 (7th Cir. 1981). In any event, the primary purpose of the affidavits submitted by Intervenor is not to give an expert opinion explaining and describing voting behavior but to accurately explain and describe the affiants' perceptions of voting behavior vis-a-vis the affiants' confidence in ballot issue elections generally. The correct standard to be applied to lay opinions is whether the opinion, rationally based on the perceptions of the witness, will assist the court in understanding witness testimony or in making a determination of a factual issue. Graham, *Handbook of Federal Evidence*, § 701.0 (3rd ed. 1991). In this case, the opinion testimony of the Intervenor's affiants assists the court in determining whether there is an appearance of corruption or loss of confidence among the citizenry in the ballot initiative process. The affidavits are therefore worthy of consideration in opposition to Plaintiffs' motion for summary judgment.

Based on the affidavits and studies submitted by Intervenor regarding appearance of corruption and citizen confidence in the ballot election process, and based on the opposing affidavit of Prof. Alexander, the court finds that there is a genuine issue of material fact whether on one or more occasions a Montana ballot initiative campaign has been so dominated by corporate money and media advertising as to overwhelm opposing citizen voices, to give the appearance of corruption, to

cause a distortion of Montana's political system, or to undermine citizen confidence in the ballot initiative process.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' motion for summary judgment is GRANTED as to Count VI and DENIED as to Counts I through V. As requested by Plaintiffs in Count VI of their Amended Complaint, the court declares that H.B. 575, enacted as Mont. Code Ann. § 13-35-236 (1997) and amending Mont. Code Ann. § 13-35-227 (1997), abridges First Amendment freedom of speech and association, as applied to the states through the Fourteenth Amendment, and is therefore unconstitutional and unenforceable. However, as to all other Counts the Plaintiffs' motion for summary judgment is DENIED because (1) the court finds that there is a genuine issue of material fact as to whether the regulations imposed upon corporations by I-125 are justified by the State of Montana's compelling interest in protecting the integrity of its political system and in avoiding corruption or the appearance of corruption in its ballot initiative process (Count I); (2) the court declares that I-125 is not void for vagueness (Counts II and III); (3) the court declares that I-125 does not violate Plaintiffs' due process rights under the Fifth and Fourteenth Amendments to the United States Constitution (Count IV); and (4) the court declares that I-125 does not violate Plaintiffs' rights under the Equal Protection Clause (Count V).

IT IS FURTHER ORDERED that Count I of the Amended Complaint is set down for bench trial on Monday, May 18, 1998, at 9:30 a.m. in the main courtroom of the United States Courthouse, Helena, Montana.

The Clerk is directed to notify forthwith the parties of entry of this order.

Done and dated this 18th day of February, 1998.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MONTANA CHAMBER OF COMMERCE; SLETTEN CONSTRUCTION; LEHRKIND'S INC.; KALISPELL AREA CHAMBER OF COMMERCE; MONTANA HOSPITAL ASSOCIATION; MONTANA FARM BUREAU; MONTANA EDUCATION ASSOCIATION, Plaintiffs-Appellees, vs. ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, Defendant, and LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125, Defendant-Intervenor-Appellant.	No. 98-36256 D.C. No. CV-97-00006-CCL ORDER FILED FEB 20 2001
MONTANA MINING ASSOCIATION; NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; GOLDEN	No. 98-36257 D.C. No. CV-98-00037-CCL

SUNLIGHT MINES, INC., YELLOW BAND BOLD, INC., CONTINENTAL LIME, INC.,

Plaintiffs-Appellees,

vs.

ED ARGENBRIGHT; MIKE COONEY,

Defendants,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Defendant-Intervenor-Appellant.

MONTANA MINING ASSOCIATION; NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; GOLDEN SUNLIGHT MINES, INC.; YELLOW BAND GOLD, INC.; CONTINENTAL LIME, INC.,

Plaintiff-Appellees,

vs.

ED ARGENBRIGHT

Defendant-Appellant,

and

No. 98-36261

D.C. No. CV-98-00037-CCL

MIKE COONEY,

Defendant,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Defendant-Intervenor,

MONTANA CHAMBER OF COMMERCE; SLETTEN CONSTRUCTION; LEHRKIND'S INC.; KALISPELL AREA CHAMBER OF COMMERCE; MONTANA HOSPITAL ASSOCIATION; MONTANA FARM BUREAU; MONTANA EDUCATION ASSOCIATION,

Plaintiffs-Appellees,

vs.

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant-Appellant,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG

No. 98-36266

D.C. No. 97-00006-CCL

2030 FUND AND CITIZENS FOR I-125,

Defendant-Intervenor.

MONTANA MINING ASSOCIATION,

Plaintiff,

and

NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; CONTINENTAL LIME, INC.,

Plaintiffs-Appellants,

vs.

ED ARGENBRIGHT; MIKE COONEY,

Defendants-Appellees,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Intervenor-Appellee.

No. 99-35032

D.C. No. CV-98-00037-CCL

MONTANA MINING ASSOCIATION,

Plaintiff,

and

No. 99-35033

D.C. No. CV-97-00037-CCL

NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; CONTINENTAL LIME, INC.,

Plaintiffs-Appellees,

vs.

ED ARGENBRIGHT,

Defendant,

and

MIKE COONEY,

Defendant-Appellant.

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Intervenor.

Before: RYMER, HAWKINS, and McKEOWN, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing and petition for rehearing en banc. Judge Hawkins voted to grant the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. An active judge called for an en banc vote, and a majority of the active judges of the court has

voted to deny the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc are DENIED.

00-1754, 00-1772

Supreme Court, U.S.
FILED
JUN 22 2001
CLERK

In The

Supreme Court of the United States

I-125 PROPONENTS' COMMITTEE,

Petitioner,

v.

MONTANA CHAMBER OF COMMERCE, et al.,

Respondents.

LINDA L. VAUGHEY,
Commissioner of Political Practices,

Petitioner,

v.

MONTANA CHAMBER OF COMMERCE, et al.,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Of Counsel:
STEPHEN A. BOKAT
National Chamber
Litigation Center
1615 H St., N.W.
Washington, DC 20062
(202) 463-5337

STANLEY T. KALECZYC
Counsel of Record
KIMBERLY A. BEATTY
BROWNING, KALECZYC, BERRY & HOVEN, P.C.
139 N. Last Chance Gulch
P.O. Box 1697
Helena, MT 59624
(406) 443-6820

Counsel for Respondents Montana Chamber of Commerce, Sletten Construction Company, Lehrkind's, Inc., Kalispell Area Chamber of Commerce, Montana Hospital Association, and the Montana Farm Bureau Federation

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QUESTION PRESENTED

1. Whether this Court should review the Ninth Circuit's opinion which is consistent with more than twenty years of precedent from this Court and with the interpretations of that precedent by other Circuits which hold that a ban on corporate contributions and expenditures made in connection with ballot issue campaigns violates the First Amendment?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondents Montana Chamber of Commerce, Sletten Construction Company, Lehrkind's, Inc., Kalispell Area Chamber of Commerce, Montana Hospital Association, and the Montana Farm Bureau Federation, or any affiliates thereof, have not issued shares to the public. The Montana Education Association was dismissed from the case prior to trial below after it disincorporated during the pendency of the lawsuit and, thus, is not a party to this action.

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STATEMENT OF THE CASE

Respondents concur with the recitation of Opinions Below, Jurisdiction, and Constitutional and Statutory Provisions Involved set forth in the Petitions for Writ of Certiorari of Linda L. Vaughey and I-125 Proponents' Committee.[1]

Respondents generally concur with the Statement of the Case presented by Petitioner Vaughey. Respondents, however, take exception to the Statement of the Case presented by the I-125 Proponents' Committee in that it fails to set forth all the facts "material to consideration of the questions presented" as required by Supreme Court Rule 14(1)(g). Additional material facts are set forth in this Opposition and referenced to the Trial Transcript ("RT") and Trial Exhibits.

REASONS FOR DENYING THE WRITS

The decisions of the Ninth Circuit and the District Court below correctly applied the controlling precedents of this Court in holding that I-125 abridges core political speech in violation of the First Amendment. The decisions below are also consistent with prior decisions of those courts themselves, as well as other Courts of Appeals, and thus there is no split in the Circuits. Petitioners failed to meet their burden of demonstrating a compelling state interest to justify the abridgment of First

[1] The decisions of the courts below are reproduced in the Appendices of the respective Petitions, which Appendices are identical. Appendix references in this Opposition are "App."

Amendment rights or that I-125 is the least restrictive means of effecting any abridgment. The Ninth Circuit and the District Court properly determined that the empirical evidence and expert testimony presented by the Respondents, Plaintiffs below, demonstrated that the political process in Montana related to ballot issues is, in the words of the District Court, "healthy and of sound integrity." 28 F. Supp. 2d 593, 598-599, App. at 46.

I. THE NINTH CIRCUIT, CONSISTENT WITH THE HOLDINGS OF THIS COURT, OTHER CIRCUIT COURTS AND ITS OWN PRIOR PRECEDENT, PROPERLY CONCLUDED THAT I-125 UNCONSTITUTIONALLY ABRIDGES POLITICAL SPEECH IN BALLOT ISSUE CAMPAIGNS.

A. *First National Bank of Boston v. Bellotti* and its Progeny Protect Speech on Ballot Issues.

This Court has consistently and unambiguously stricken as violative of the First Amendment any attempts to prohibit or limit contributions or expenditures in connection with discussion of public policy issues, including ballot issues. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981). Likewise, both the lower federal courts and state courts have respected the importance of robust political speech and debate concerning ballot issues. *C & C Plywood Corp. v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976), *aff'd*, 583 F.2d 421 (9th Cir. 1978); *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980); *Schwartz v. Romnes*, 495 F.2d 844 (2d

Cir. 1974); *Pacific Gas & Electric Co. v. Berkeley*, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976).

As this Court held in *Bellotti*, the proper question is not whether corporations have First Amendment rights or whether those rights are similar to the rights of natural persons; rather, the question is whether "[this statute] abridges expression that the First Amendment was meant to protect." *Id.* at 776. Continuing, this Court stated:

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

Id. at 777 (footnotes omitted).

This Court's decision in *Bellotti* was followed two years later by *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980), in which the Court struck down, again on First Amendment grounds, a decision of the New York State Public Service Commission which prohibited public utilities from including mailing inserts with customer bills which discussed controversial issues of public policy. In so ruling, the Court, expressly relying upon its prior decision in *Bellotti*, concluded:

> The Commission's suppression of bill inserts that discuss controversial issues of public policy

> directly infringes the freedom of speech protected by the First and Fourteenth Amendments. The state action is neither a valid time, place, or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest. Accordingly, the regulation is invalid.

447 U.S. at 544 (citations omitted).

In its next term, this Court again addressed a state effort to limit the ability to speak on public policy issues. In *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981), the Court invalidated a law that would have limited contributions to political committees formed to support or oppose ballot issues. The Court recognized that "undue influence" is a potential problem in candidate election cases, but cases upholding limits or restrictions in the candidate arena do not support limitations on ballot issues. "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections [citations omitted] simply is not present in a popular vote on a public issue." 454 U.S. at 298 (citing *Bellotti*, 435 U.S. at 790).

The animating consideration in each of these cases is the concern that First Amendment rights may be limited only where there is a showing of a compelling governmental interest. As this Court noted in *Federal Election Comm'n v. National Conservative Political Action Committee*, 470 U.S. 480, 495-96 (1985), *Bellotti* stands for the proposition that "a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates."

In its more recent decisions, this Court has reiterated that the *Bellotti* standard is applicable in determining the constitutionality of prohibitions and restrictions upon the exercise of First Amendment rights in ballot issue campaigns. In *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334 (1995), a case decided after *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990),[2] the Court found unconstitutional a prohibition against the distribution of anonymous campaign materials which applied "to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage." 514 U.S. at 351-352 & n.15 (citing *Bellotti*, 435 U.S. at 790, for the proposition that "[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue"). In *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), the Court, citing to the same language in *Bellotti* that it relied upon in *McIntyre*, noted that, "ballot initiatives do not involve the risk of '*quid pro quo*' corruption present when money is paid to, or for, candidates." 525 U.S. at 203 (citations omitted).

In view of this clear line of precedent, it is no wonder the Ninth Circuit properly concluded I-125 is unconstitutional:

> It follows that I-125 unconstitutionally restricts public discussion in the ballot issue (initiative) process. As the Court concluded in *Bellotti* with

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[2] Petitioners argue *Austin* created a new standard for determining permissible abridgements of First Amendment rights. This is simply not the case.

> respect to the Massachusetts statute, we conclude here that, " '[a] restriction so destructive of the right of public discussion [as I-125], without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment.' " [*Bellotti*, 435 U.S.] at 792 (quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1945)).

226 F.3d 1049, 1057-1058, App. 20-21 (citations omitted; footnote omitted).

Over twenty years earlier, both the Montana District Court and the Ninth Circuit reached the same conclusion that efforts by the state of Montana to prohibit corporations from making contributions or expenditures on ballot issues violates the First Amendment. In *C & C Plywood Corp. v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976), *aff'd*, 583 F.2d 421 (9th Cir. 1978), the District Court found that a statute prohibiting such contributions and expenditures by corporations unconstitutionally affected core First Amendment rights, and the government's stated interest in keeping the electoral process free from corporate influence or corruption was deficient and not a valid compelling state interest. "[T]he State of Montana cannot constitutionally legislate a direct prohibition on the exchange of ideas and information, involved in one form of the legislative process, merely because the source of the information is a corporation." *Id.* at 1265. The Ninth Circuit concurred, stating "the portion of [the statute] which forbids payments or contributions by corporations in support of or opposition to ballot issues is an unconstitutional restriction of corporate First Amendment rights." 583 F.2d at 425.

The Ninth Circuit's decision in this case and in *C & C Plywood* comports with decisions from other jurisdictions which have stricken on First Amendment grounds laws similar to I-125. *See, e.g., Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980) (striking down a Florida statute that restricted the amount of contributions to political committees in support of, or in opposition to, ballot issues); *Schwartz v. Romnes*, 495 F.2d 844 (2d Cir. 1974) (narrowly construing a New York statute so that corporations could contribute to ballot campaigns); *Pacific Gas & Electric Co. v. Berkeley*, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976) (striking on First Amendment grounds a city ordinance prohibiting an electric utility from disseminating information on a referendum issue involving municipal acquisition of that utility). There simply is no split among the various Circuits.

In this case, the Ninth Circuit recognized that what is at issue is the right of the electorate – who are the decision makers on constitutional and statutory proposals brought before them through the initiative and referendum process – to hear as many points of view and receive as much information as possible to assist them in their decision-making process. The Ninth Circuit properly followed the line of cases beginning with *Bellotti* which protect this vital First Amendment interest and found I-125 to be unconstitutional.

B. The *Austin* Decision Does Not Apply to Ballot Issues and Does Not Establish a New Standard Applicable to Ballot Issue Cases.

Petitioners argue that *Austin* established a new criterion for determining when First Amendment rights may be curtailed in the context of ballot issue elections, and

that Austin has *sub silentio* overruled *Bellotti*. Nothing can be further from the truth.

1. *Austin* applies only to candidate campaigns.

Austin itself did not even address ballot issues. Rather, the issue was whether Michigan could constitutionally prohibit independent expenditures made by corporations in support of or opposition to *candidates*. 494 U.S. at 654. Petitioners' argument that *Austin* created a new standard that applies to ballot issue campaigns as well as candidate campaigns is based upon their reading of a self-proclaimed "critical passage" which is taken out of context. Indeed, the context in which the *Austin* Court conducted its analysis was specifically that of independent expenditures in *candidate* campaigns:

> Although this Court has distinguished these [independent] expenditures from direct contributions in the context of federal laws regulating individual donors, it has also recognized that a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by corporations to influence *candidate elections*. Regardless of whether this danger of "financial *quid pro quo*" corruption may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas. . . . We therefore hold that the State has

> articulated a sufficiently compelling rationale to support its restriction on independent expenditure by corporations.

Id. at 659-660 (emphasis added; citations omitted).

Two of the Justices who concurred in Austin specifically noted the result would have been different had the subject matter of the controversy involved a ballot issue rather than independent expenditures made on behalf of candidates. Justice Brennan, after first noting the Michigan statute at issue is directed at independent expenditures made in support of candidates, 494 U.S. at 669, concluded, "A corporation remains free, for example, to use general treasury funds to support an initiative proposal in a state referendum [citing *Bellotti*]." *Id.* at 676 (Brennan, J. concurring). Likewise, Justice Stevens noted, "[A]s we recognized in *First National Bank of Boston v. Bellotti*, there is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other." *Id.* at 678 (Stevens, J. concurring) (citation and footnote omitted).

Petitioners rely upon "observers" who believe *Austin* stands for the proposition that legislatures are free to restrict corporate expenditures in ballot measures as well as in candidate elections. These "observers," like the Petitioners, are simply wrong. *Austin* stands for the narrow proposition that it is constitutionally permissible to prohibit certain corporations from making independent expenditures in support of or opposition to *candidates*. *Austin*, like the earlier decision, *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), a case involving prohibitions on corporate expenditures made

in connection with Federal candidate campaigns (upon which Petitioners also rely), has nothing to do with ballot issues. The only arguably "new" standard set forth by *Austin* applies to candidate elections, and has no application to ballot issues.

2. This Court has recognized a constitutionally significant distinction between ballot issue campaigns and candidate campaigns.

The distinction made by Justice Stevens in his concurring opinion in *Austin*, that, "[T]here is a vast difference between lobbying and debating public issues . . . and political campaigns for election to public office," 494 U.S. at 678, is firmly rooted in First Amendment jurisprudence. A ballot campaign involves a battle over ideas, political debate in its purest form.

> At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.

Turner Broadcasting System, Inc. v. Federal Communications Comm'n, 512 U.S. 622, 641 (1994) (citations omitted). For this reason, this Court has consistently prohibited attempts, like I-125, to limit the discussion of political issues.

The use of the *Austin* standard to legitimize I-125 would prohibit an entire class of speech and suppress discussion of certain topics by certain segments of Montana's population. *Turner Broadcasting*, 512 U.S. at 642-643.

I-125 facially prohibits only certain types of corporate speech. It does not affect commercial speech or public service announcements, unless the topic is also the subject of a ballot issue. Thus, for example, a corporation could produce public service announcements about the value of smoke detectors in the home, but may not support a ballot issue requiring smoke detectors be installed in every home purchased in a community. Likewise, while a corporation could advocate to the Montana Legislature that this same hypothetical smoke detector requirement be enacted, it could not under I-125 support that same statutory change if it appeared as an initiative or referendum on the ballot. This constitutes an impermissible, content-based regulation which extends "not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison*, 477 U.S. at 537.

Petitioners' unspoken justification for applying the *Austin* standard is that the views of the corporate speaker are to be silenced because corporate opposition to certain ballot initiatives has at times been effective in persuading the electorate to vote against those initiatives. As the Court noted in *Bellotti*, however, the point of such corporate contributions or expenditures in connection with ballot campaigns is to provide information and change minds:

> To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But *the fact that advocacy may persuade the electorate is hardly a reason to suppress it*: The Constitution "protects expression which is eloquent no less than that which is unconvincing."

Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. at 689.

435 U.S. at 790 (emphasis added). If, during the course of an election cycle, the electorate receives information which results in a change of opinion, and on election day voters cast their votes differently than they would have at the beginning of the campaign, this is evidence of a healthy democracy and an electoral process which retains its integrity. However, if the *Austin* standard is applied to ballot issue campaigns, it would effectively cut off speech and dissemination of information on issues by one side of the debate, thereby denying corporations and certain individuals the right to speak and also denying the entire electorate the right to hear and thus to be informed about diverse viewpoints on public policy issues. The Ninth Circuit applied the correct standard and certiorari is unwarranted.

II. THE RECORD ESTABLISHES THAT IT IS IMPERMISSIBLE TO RELY UPON A SEPARATE SEGREGATED FUND AS AN APPROPRIATE ALTERNATIVE METHOD OF SPEECH SINCE SUCH A FUND IS NEITHER THE LEAST RESTRICTIVE MEANS FOR ABRIDGING FIRST AMENDMENT RIGHTS NOR AN ADEQUATE ALTERNATIVE TO UNFETTERED CORE POLITICAL SPEECH.

Once it is established that First Amendment rights have been infringed, the infringement may be upheld only if the state's actions are both necessary and narrowly tailored to serve a compelling state interest. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45

(1983). "Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison*, 447 U.S. at 540. In the instant case, after six days of trial testimony and evidence, the District Court determined Petitioners not only failed to demonstrate a compelling state interest, but they failed to demonstrate I-125 affords the least restrictive means for abridging First Amendment rights. After review of the record, the Ninth Circuit agreed.

Petitioners argue the corporate voice is not silenced because I-125 permits an alternative form of expression: A corporation may establish a separate fund through which it may make contributions or expenditures in connection with ballot campaigns. This rationale for justifying abridgment of First Amendment rights has been soundly rejected by this Court. *Consolidated Edison*, 447 U.S. at 541, n.10 ("[W]e have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression."); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757, n.15 (1976) (invalidating a prohibition on advertising of prescription drug prices justified in part on the theory that consumers could obtain the information in some other way).

Moreover, the evidence presented at trial clearly demonstrated that a separate fund is not an adequate or meaningful alternative to the silencing of corporate voices. One witness, the Chief Executive of a publicly traded corporation, testified that although a corporation

could assist its employees in establishing and administering a political committee, neither his corporation nor its officers or directors had any ability to direct the use or expenditure of those funds. RT 64-66. He also testified that approximately one-half of the shareholders are themselves corporations, RT 45-46, which would be precluded by I-125 from contributing to any such fund.

The President of an incorporated labor organization testified that although his union had established a separate fund as permitted by I-125, that fund was unable to attract sufficient financial support, primarily because its members believed the dues they already paid were to be used to support political advocacy on their behalf, including advocacy on various ballot issues. RT 185-186.[3]

This testimony clearly established that a corporation and a corporate-sponsored political committee are not the same, nor can a corporation adequately express its views on ballot issues through the use of a separate fund as contemplated by I-125. Thus, because the separate fund provision is not an avenue for corporate expression, the corporate voice is, indeed, silenced and Petitioners failed to prove the separate fund provisions meet the least restrictive means standard.

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[3] At the time I-125 was enacted, the Montana Education Association (MEA), an incorporated labor organization, was a plaintiff in this suit. By the time of trial below, it had disincorporated, and was thus no longer subject to the prohibitions contained in I-125. Accordingly, the MEA was dismissed.

III. THE NINTH CIRCUIT PROPERLY REVIEWED THE DETERMINATIONS OF THE DISTRICT COURT *DE NOVO* WHEN IT DETERMINED THAT THE PETITIONERS DID NOT DEMONSTRATE A COMPELLING STATE INTEREST JUSTIFYING AN ABRIDGMENT OF CORE POLITICAL SPEECH IN BALLOT ISSUE CAMPAIGNS.

At trial, the Respondents, Plaintiffs below, had the initial burden of making a prima facie showing that I-125 abridged Plaintiffs' First Amendment rights. The burden then shifted to the State of Montana and Intervenors, Petitioners here, to demonstrate a compelling interest to justify such an infringement. *Colorado Republican Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604, 609 (1996); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In characterizing the testimony presented by the Petitioners at trial as "meager anecdotal evidence," 28 F. Supp. 2d at 600, App. at 49, the District Court below properly concluded that the State and the Intervenor failed to meet their burden to "show a compelling state interest to justify a significant infringement of core First Amendment rights." *Ibid.* In affirming the District Court, the Ninth Circuit observed that it could not say that Judge Lovell's findings were "clearly erroneous." The Ninth Circuit reviewed the record before it and the constitutionality of I-125 *de novo*. 226 F.3d at 1054, App. 13. ("We determine the constitutionality of I-125 de novo.") Indeed, not only were Judge Lovell's findings not "clearly erroneous" but, as the Ninth Circuit concluded, were wholly supported by the record.

The Petitioners failed to produce evidence that would support a judicial finding that corporate wealth has dominated citizen voices to the detriment of the initiative and referendum process in Montana. Rather, as Respondents' expert, Professor James Lopach, former Chair of the Political Science Department at the University of Montana and an acknowledged expert in the field of Montana's electoral politics, including ballot initiatives, explained during cross-examination, as he conducted his research on the impact of corporate contributions and expenditures in connection with ballot issues, he was "looking for a breach of trust, or . . . a decay that results in cynicism and detachment of the Montana electorate with respect to direct democracy. And I don't see that." RT 364. Professor Lopach reached two conclusions: First, there is no corruption or appearance of corruption in Montana's ballot initiative process. RT 317-318. Second, I-125 will have a negative effect upon the health of the electoral process since it will cut off meaningful speech in politics. RT 345. Judge Lovell accepted the expert testimony of Dr. Lopach that, "[T]his Montana political process is healthy and of sound integrity." 28 F. Supp. 2d at 598-99, App. at 46. Reviewing this record, the Ninth Circuit saw no reason to disturb the findings of the District Court. 226 F.3d at 1057, App. at 20.

The record below demonstrates there was no imminent threat to the democratic process and the Montana electoral process is healthy: There is no evidence of corruption in the form of buying and selling votes or in tampering with election results. RT 874-875. Voter turnout in Montana remains high, Exhibit 32, RT 322, and, in fact, is approximately 15 percentage points higher than the

national average. Exhibit 32, RT 324. Voter fall-off, the failure of voters to vote for all measures on a ballot including those at the bottom of the ballot, is low. Exhibit 32, RT 325-326. In many instances the percentage of voters voting on ballot measures, which are placed on the bottom of the ballot, is higher than the percentage of voters voting on statewide candidate elections, which are placed at the top of the ballot. Exhibits 33-43, RT 326-332.

There is no one factor that influences an election and dictates an outcome. RT 335-337. There is no empirical evidence that the expenditure of money is the principal determinant of the outcome of a ballot issue campaign. In 24 ballot issues where both sides spent money, the side spending the most won only 50 percent of the time. Exhibit 95, RT 341. And, in the 19 ballot elections where two-thirds of the money was spent by one side, the side spending the most won 10 times and lost 9 times. Exhibit 111, RT 1061-1062. In many, but not all, ballot elections where large amounts of money were spent, there was higher voter participation than in ballot elections where little money was spent. Exhibit 106.

The evidence demonstrated that the most important factor which influences outcome is the development of a credible, concise and understandable campaign message. RT 220. The various techniques used to communicate that message do not all involve money and in many instances the difference in funding of opposing sides may itself become a campaign issue. RT 227. Even the Petitioners' witnesses who testified anecdotally about their specific ballot issue experiences agreed that the funding of their opponents' campaigns was, itself, an election issue. RT

559-560; 655-662; 696-698; 1033-1034. The evidence demonstrated that in those campaigns the electorate was fully informed about the issues and voted based upon the competing messages.

The record below demonstrated that the ballot issue process in Montana prior to the enactment of I-125 operated in harmony with "a major purpose of [the First] Amendment . . . to protect the free discussion of governmental affairs." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). After its enactment, I-125 operated to serve a constitutionally impermissible purpose of attempting to equalize the ability of groups or individuals to participate in the electoral process by prohibiting contributions or expenditures by one group made in connection with ballot issue campaigns. As this Court has held:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to "secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure an unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "

Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964) (citations omitted)). *See also, Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998).

CONCLUSION

The Ninth Circuit properly concluded I-125 is an unjustified and unconstitutional restriction of First Amendment freedoms, and thus properly upheld the District Court's decision. In so concluding, the Ninth Circuit correctly applied the standards set forth in *Bellotti* and other controlling precedents of this Court and determined *Austin* is inapplicable to this case. Every Court of Appeals which has addressed this issue is in agreement that *Bellotti* and its progeny are the controlling precedent and there is no split in the Circuits. Petitioners' claims that the Ninth Circuit failed to use the proper standard of review in deciding this case are without merit. Rather, Petitioners failed to demonstrate that there is a compelling state interest to justify this abridgment of core political speech.

For the foregoing reasons, Respondents respectfully request that the Petitions for Writ of Certiorari be denied.

Respectfully submitted,

STANLEY T. KALECZYC
Counsel of Record
KIMBERLY A. BEATTY
139 North Last Chance Gulch
P.O. Box 1697
Helena, MT 59624
(406) 443-6820

Counsel for Respondents Montana Chamber of Commerce, Sletten Construction Company, Lehrkind's, Inc., Kalispell Area Chamber of Commerce, Montana Hospital Association, and the Montana Farm Bureau Federation

Of Counsel:

STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

(3)

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In The

Supreme Court of the United States

LINDA L. VAUGHEY,
Commissioner of Political Practices,

Petitioner,

v.

MONTANA CHAMBER OF COMMERCE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MIKE MCGRATH
Attorney General of Montana
JAMES M. SCHEIER*
Assistant Attorney General
State of Montana
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. I-125 IS JUSTIFIED BY THE "NEW" TYPE OF CORRUPTION IDENTIFIED BY THIS COURT IN *AUSTIN*.

The Respondents' brief reveals their failure to appreciate the import of this Court's decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), where the Court recognized a new type of corruption, the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. The Court went well beyond the traditional concept of political corruption, noting that it was **not necessary** to address whether Michigan's restriction on the use of corporate treasury funds was supported by the state's interest in preventing quid pro quo corruption. *Austin*, 494 U.S. at 659-60. In *Austin* and *FEC v. Massachusetts Citizens for Life* (*MCFL*), 479 U.S. 238 (1986), this Court recognized that state laws permit corporations to accumulate vast amounts of capital, and this corporate wealth can be used improperly to skew political debate. Thus, states have a compelling interest in ensuring that the wealth accumulated by corporations in the economic marketplace with the help of the corporate form may not be used by corporations to obtain "an unfair advantage in the political marketplace." *Austin*, 494 U.S. at 659-60; *MCFL*, 479 U.S. at 257-58.

The Respondents' argument that the *Austin* decision is limited in its application to candidate campaigns is not supported by a logical reading of the case. Nothing in

Austin suggests that its rationale for regulating corporate spending is limited to candidate elections. Although *Austin* involved independent expenditures in candidate campaigns, the type of corruption addressed by the Court relates to the political process generally. The Court, in fact, referred to it as a "different type of corruption in the *political arena*. . . . " *Austin*, 494 U.S. at 660 (emphasis added). This Court also emphasized that states have an interest in ensuring that the state-created advantages enjoyed by corporations not be used by corporations to obtain "an unfair advantage in the **political marketplace**." *MCFL*, 479 U.S. at 257-58; *Austin*, 494 U.S. at 659-60 (emphasis added). The use of these terms by this Court suggests application beyond candidate elections.

As pointed out in Petitioner's opening brief, a number of commentators have recognized that the rationale of *Austin* and *MCFL* would permit states to require the use of separate, segregated funds for corporate expenditures in ballot issue campaigns, as well as for independent expenditures related to candidates. This is because the type of corruption discussed in *Austin* and *MCFL* is based on the **source** of the money, as explained by one of the commentators cited in the Petitioner's opening brief:

> The key difference between [the quid pro quo corruption discussed in *Buckley v. Valeo*, 424 U.S. 1 (1976)] and *Austin* corruption is that the former turns on the impact of funds on candidates, while the latter focuses on the source of the funds used for electoral purposes. Because corporate expenditures on ballot measures financed through general treasury funds are tainted in

> just the same way as candidate-oriented expenditures, under *Austin*'s conception of corruption both should be treated as evils the state has a valid interest in preventing.

Adam Winkler, *Beyond Bellotti*, 32 Loy. L.A. L. Rev. 133, 174 (1998).

As the evidence presented at trial reveals, Montana's historical experience with massive corporate spending on ballot issues vividly demonstrates the need to regulate such spending by controlling the source of the money used by corporations in the political arena. Corporate money was the dominant and overwhelming factor in the defeat of at least four Montana ballot issues: I-87, known as the Montana "bottle bill"; I-113, the second Montana bottle bill proposed eight years later; I-115, which would have increased state taxes on tobacco products to fund health programs and reduce smoking; and I-122, Montana's "clean water" initiative. (Tr. at 103-04, 556-57, 638-41, 1019-20; Exs. 505, 506, 508, 532, 545, 801.)

Testimony at trial also underscores the disillusionment experienced by Montana citizens who had devoted their time and energies to several ballot issue campaigns, only to have corporate spending drown out their voices and the efforts of citizen supporters of the ballot issues. For example, Dr. Robert Shepard, a Helena, Montana physician, took an unpaid leave of absence from his practice to work in support of I-115, the tobacco initiative. While the proponents of the initiative raised $44,000, the opposition, funded by nearly $1.6 million in contributions from out-of-state tobacco companies and trade organizations, outspent the proponents by a ratio of 36 to 1. Dr. Shepard's testimony revealed his discouragement:

> I haven't been on another initiative since then, even though there have been a few that I've supported with dollars and a few that I've supported intellectually, at least. I came away from that initiative with a really sour taste in my mouth. The process clearly doesn't work. One immensely wealthy corporation has the opportunity to come in and pay as much money as it needs to pay to influence the voters the way it wants to influence the voters.

(Tr. at 540.)

II. CASES CITED BY THE RESPONDENTS THAT WERE DECIDED PRIOR TO *AUSTIN* DO NOT ADDRESS THE NEW TYPE OF CORRUPTION THAT CAN RESULT FROM THE ACCUMULATION OF CORPORATE WEALTH AND THE STATUTES CONSIDERED IN THOSE CASES ARE DISTINGUISHABLE FROM I-125.

Dismissing the significance of the *Austin* decision, the Respondents' brief instead relies primarily on *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), and *C & C Plywood Corp. v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976), *aff'd*, 583 F.2d 421 (9th Cir. 1978). *Bellotti*, *Citizens Against Rent Control*, and *C & C Plywood*, as well as all of the other cases cited on pages 2-4 of the Respondents' brief, were decided prior to this Court's decisions in *MCFL* and *Austin*. All of those decisions, therefore, must be examined and analyzed in the context of the Court's later rulings in *MCFL* and *Austin*, wherein the Court recognized the new form of corruption discussed above.

It is also important to bear in mind that the statutes at issue in those older cases are all distinguishable from I-125. The statute struck down by the Ninth Circuit Court in *C & C Plywood* imposed an absolute ban on corporate spending on ballot issues. I-125 permits corporations to raise and expend money through separate, segregated funds. Thus, *C & C Plywood* has no application to the issues in this case.

The statute at issue in *Bellotti* prohibited corporations from making contributions or expenditures in connection with ballot issues, except on questions that materially affected the property, business, or assets of the corporation. The statute also provided that no ballot issue affecting taxation of the income, property, or transactions of individuals would be deemed to materially affect the corporation. *Bellotti*, 435 U.S. at 768. Like the statute considered in *C & C Plywood*, there was no provision permitting corporate expenditures through separate, segregated funds. In *MCFL*, this Court noted that the regulation of campaign financing with the permissible use of a separate, segregated fund "is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in [*Bellotti*]." *MCFL*, 479 U.S. at 259 n.12.

The ordinance considered by this Court in *Citizens Against Rent Control* limited all contributions to ballot issue committees to $250, regardless of the source. The restrictions of the ordinance applied to "persons," not specifically to corporations and, like the statutes examined in *Bellotti* and *C & C Plywood*, included no provisions permitting spending through separate, segregated funds. In contrast, I-125 requires non-exempt corporations to

make contributions through separate, segregated funds with no monetary limit on the amount of such contributions.

Contrary to Respondents' arguments, I-125 did not "silence" corporations, nor was it designed to "equalize" the ability of individuals or non-corporate entities to participate in the electoral process. Rather, its purpose was to regulate the **source** of the funds used by corporations to influence ballot issues by requiring that such spending come from segregated funds. I-125, in fact, permits corporations to spend **unlimited** amounts in support of, or opposition to, ballot issues, as long as the funds are contributed by shareholders, employees, or members of the corporation, including officers. This ensures that the money spent by corporations was intended by those who contributed it to be used for political purposes:

> By requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending, § 441b seeks to prevent this threat to the political marketplace. The resources available to *this* fund, as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee. . . . The expenditure restrictions of § 441b are thus meant to ensure that competition among actors in the political arena is truly competition among ideas.

MCFL, 479 U.S. at 258-59.

The Respondents' claim that a separate fund is "not an adequate or meaningful alternative" rings hollow given the failure of most of the corporations involved in

this litigation to even establish and utilize the separate, segregated fund mechanism authorized by I-125. Moreover, the trial testimony reveals that those few corporations who did establish segregated funds for ballot issue campaign purposes had considerable success, particularly in view of the fact that 1998 was the first election year in which I-125 was in effect. (Tr. at 63, 76-77, 190, 192, 202.)

III. THE POST-*AUSTIN* CASES CITED BY THE RESPONDENTS ARE NOT RELEVANT.

The more recent cases cited by the Respondents on page 5 of their brief have no bearing on this case. *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334 (1995) involved consideration of an Ohio statute that prohibited anonymous writings supporting or opposing candidates or ballot issues. The Colorado statute before the Court in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) placed certain restrictions on initiative petition circulators and established disclosure requirements for proponents of initiatives. Thus, neither case involved laws governing corporate spending on ballot issues. And, in each case, this Court cited *Bellotti* for the proposition that ballot issues do not pose a danger of quid pro quo corruption. Neither case discussed the "new" type of corruption addressed by the Court in *Austin*; therefore, neither case has any relevance to the issue presented by this petition.

IV. THE DISTRICT COURT'S FINDINGS, ON WHICH RESPONDENTS RELY, REFLECT THAT COURT'S MISUNDERSTANDING OF THE GOVERNING LEGAL PRINCIPLES.

Like the district court, the Respondents challenge the adequacy of the evidence presented by the Petitioner and Intervenor on the question of whether the use of corporate money dominated ballot issue campaigns in Montana. However, the district court's conclusion was fundamentally flawed because it based its ruling on the traditional quid pro quo form of corruption that can arise in candidate campaigns, rather than the new form of corruption discussed by this Court in *MCFL* and *Austin*. In any case, under the *Austin* standard, there is no requirement that a state make such an empirical showing. Rather, this Court in *Austin* focused on the **potential** for distortion of the political process through the use of the corporate form. *Austin*, 494 U.S. at 661. Thus, it is **apparent** corruption, rather than **actual** corruption, that forms the primary basis for the restrictions of I-125. Such efforts to regulate corporate speech are matters of legislative judgment that are entitled to "considerable deference" by the courts. *MCFL*, 479 U.S. at 258 n.11; *see Austin*, 494 U.S. at 661.

V. THIS ISSUE IS TIMELY AND OF EXCEPTIONAL IMPORTANCE.

Demonstrably valid concerns regarding the ability of corporations to dominate and distort the political process

led Montana voters to adopt I-125. Contrary to the assertions of the Respondents, I-125 does not deny corporations the right to speak, nor does it deny the electorate the right to hear differing viewpoints on ballot issues. I-125's segregated fund requirement for corporate speech is justified by "the unique state-conferred corporate structure that facilitates the amassing of large treasuries" and "ensures that [corporate] expenditures reflect actual public support for the political ideas espoused by corporations." *Austin*, 494 U.S. at 660.

The Court should take the opportunity to review this important issue now. This Court's recent decisions in *FEC v. Colorado Republican Federal Campaign Comm.*, ___ U.S. ___ (slip op. June 25, 2001) and *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), reveal considerable disagreement regarding the extent of authority of the federal government and states to regulate campaign spending. The district court in this case has invalidated a statute adopted by popular vote of the people of the state of Montana, thereby prohibiting Montana from enforcing a law designed to address precisely the type of corruption identified by this Court in *Austin*. Campaign finance bills in Congress demonstrate the ongoing importance of the issue and this case presents a timely opportunity for the Court to provide guidance regarding the relationship between the legal principles announced in *Austin*, *MCFL*, *Bellotti*, and the more recent decisions addressing regulation of campaign financing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MIKE MCGRATH
Attorney General of Montana
JAMES M. SCHEIER*
Assistant Attorney General
Justice Building
P.O. Box 201401
Helena, MT 59620-1401

**Counsel of Record*

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